

1. Board Governance

Speaker Key:

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EL Welcome to the Community Colleges Australia podcast. I'm Ellen Leabeater. You're listening to the first episode in an eight-part series on board governance.

This episode will give you an overview of why good governance is important. You'll also hear about the legal obligations of a director. Ty Wiggins and Katherine Sainty will be guiding you in this episode.

Ty is the principal of Converge Consulting, and Katherine is the founder of Sainty Law. Both have extensive experience working with not-for-profit and full-profit boards. Ty Wiggins is up first, explaining what good governance is.

TW Good governance is a system of processes, disciplines and accountabilities that organisations have, predominantly where the CEO is not the owner of the organisation.

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So, where the owner runs the organisation, governance takes a different approach. But in organisations like the colleges, where the CEO and the board are separate, governance is their relationship, the accountability, the responsibilities and the rules around how the organisation works.

EL Why is good governance important?

TW Good governance is essential, again, wherever the CEO is distinct from the ownership. So, if we think about the origins of governance as a concept, it's around what's called the agency theory, which is the separation of ownership to management.

So, it's to ensure that the manager runs the business to the best interests of the owners, and in these cases, it's the community that owns it. So, it's a joint responsibility for the CEO and the board to run the organisation to the best interest of the stakeholders, the primary stakeholders which is the community.

Without the governance frameworks and rules, we see all sorts of issues around personal agenda, misappropriation of funds, you know, favours for people that they know, a whole variety of things can go pear-shaped, if the rules aren't in place.

EL How do we know if an organisation does have good governance?

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TW Unfortunately, you tend to tell the absence of good governance after an event. So, organisations that fail, and then there's an investigation or some research into why, often tell you that the governance process has been flawed.

Good governance generally shows up in operational efficiency, good staffing levels, low retention, low level of complaints. But unfortunately, it's the absence that we see more often, when things go bad.

EL Many of these colleges are governed by the Australian Charities and Not-for-Profits Commission. What are the responsibilities of boards and CEOs under that commission?

TW So, their responsibility is primarily to ensure that they adhere to the rules set as it relates to being a not-for-profit entity. And that's really around how they generate income, how they account for that income, how they employ and reward staff.

The primary challenge is the income source and what they do with that income. So, a not-for-profit is a bit of a misnomer. Not-for-profit doesn't mean these organisations run at a loss. Not-for-profit means that they don't take profit out and essentially take it like a normal business owner. So, these businesses still make a profit, and they need to be able to justify where they've put their profit back into the business.

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One of the big issues in the space is that you can, unfortunately, generate a culture of people who think not-for-profit is non-profit. Therefore, they're not as stringent with financial responsibilities as they might be. They can be a little bit wasteful, they can be a little bit casual about things.

But they need to be really, really clear. No business will exist long term if it's not profitable. And not-for-profit just means that the profit is not taken out by the owners, and it's ploughed back into the business or into the community.

EL So, we know of, let's say, corporate boards where directors can get in trouble for taking money where they shouldn't, trading insolvent, that sort of thing. Are there any legal responsibilities in the not-for-profit sector that board members have?

TW Board members have the same fiduciary duties that any director has.

EL What's a fiduciary duty?

TW Ah, so there's a list of responsibilities, primarily around the solvency of the business. So, if a business trades insolvent, there's a responsibility and obligation on the directors to disclose that, make decisions in accordance with the rules around insolvency, and if they don't, they can be held personally liable.

EL This is even within the not-for-profit sector, so you could potentially go to jail, get fined, what's the...?

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TW Jail would have to be a very extreme case, and you'd have to demonstrate individual culpability and lack of good judgement. So, that would be an extreme case.

But yes, signing up to be a director, even of a not-for-profit, carries the same level of director responsibilities that any publicly trading entity would take.

EL Obviously you hope that doesn't happen. What are some of the benefits that come with being a board member on a not-for-profit?

TW The primary reason I think people join the board is to ensure the longevity of the organisation, to support the local community and to give back. There are other reasons, I think people join community-based boards sometimes to get board experience. If they want to pursue other board appointments.

The way a board functions officially, is good exposure at any level. So, if you've not been on a board before, you could certainly jump onto a not-for-profit or community-based board to get that experience.

But for the most part, people tend to volunteer their time because they believe the organisation does good for the community, and they want that to survive.

And I think with the community colleges especially, they're in a really interesting space. They do great work, they plug a gap that no one else wants to fill, they provide education services that sometimes aren't funded, but the community desperately needs.

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The scary thing about it, though, is that when they fail, they don't resurrect. No one steps into the place. So, I think that a key challenge for all CEOs and boards of community colleges around the country, is that you need to make sure that you... you make the right decisions to make sure the business exists, the organisation exists beyond you. Because if it fails, it will be gone forever.

EL Ty Wiggins from Converge Consulting. You can hear more from Ty in the second episode of this series, where he explains the ins and outs of the chair and CEO relationship. Now, here's Katherine Sainty, from Sainty Law.

KS Hello, my name's Katherine Sainty, I'm the founder of a law firm called Sainty Law. We advise clients on commercial law issues, but we also have a speciality in the technology, media and data space.

EL What is the role of a board?

KS The board's role is to oversee the operation and finances of an organisation. It's to be externally focused, not internally focused. So, it's role is not operations, it's involved with the settings of the organisation. Management's in charge of operations. And that's often something that boards need to be careful of, that they don't get drawn into the operations area.

EL So, looking at the legal perspective, what are the obligations of a director?



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KS Basically, there's four main legal duties of a director. And the first one is the duty to act in good faith, in the best interests of the organisation, for a proper purpose. And I can come back and elaborate on that. The second one is the duty to act with reasonable care, skill and diligence. The third is not to improperly use information or position. So, if you get information, you shouldn't use it for an improper purpose, and a classic example of that would be insider trading, if you were in a commercial board. And then the fourth duty is a duty to disclose and manage conflicts of interest.

So, really what you're looking at is, if you take on the role of a director, you need to know what you're supposed to do, and do it well and conscientiously.

EL Let's talk a little bit more about that duty to act in good faith. What does it mean in a practical sense?

KS The duty to act in good faith is a duty with two parts. The first one, to act in good faith, it means that you have to act honestly, fairly, and loyally when you make decisions for your organisation. And you've got to make those decisions with a view to what's best for the organisation.

And that's multi-levelled as well, because the organisation is both the corporate body, it's the people who are the shareholders or the members of that body, and it's also to some extent the people who are stakeholders, or interested parties.

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So, you've got to act primarily in the interest of the company, but you've got to look at the other people whose interests impinge on that.

The second of aspect of the duty to act in good faith, is to act for a proper purpose, and within the powers that you've got. And that means that you look to the purpose of the organisation.

So, if you've got a not-for-profit and its purpose is to donate money to cancer research, and you find that the management feels that you should donate the money you've been given by donors to earthquake relief, well, that's not the purpose for which you're set up, or the purpose for which you're supposed to be spending that money. So, it would be not discharging your duty properly, if you were to direct funds in the wrong direction.

EL Tell me a little bit about the... about managing conflicts of interest.

KS So, a conflict of interest is an interest where a person who's got... like a director, who's got a duty to act in the best interest of the company, is presented with the opportunity, or potential to use... to act in their own best interests. And the two don't coincide.

So, it might be that you are given the opportunity to act for the benefit of your company or for the benefit of yourself, or a relative, or a friend, and you let the relative or friend benefit to the detriment of the company for which you are a director... of which you are a director. And that is a conflict of interest situation.

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You often find them in not-for-profit environments. It's not prohibited to have a conflict of interest. It's prohibited to act in an... in your own interests against your organisation.

But, there are processes to deal with conflicts of interest if they arise. And they involve disclosing in good time to the organisation that there is a conflict or a potential conflict, and being open and honest about that. And then not taking part in any decisions of the company that might be relevant to that conflict.

So, for instance, if there's a contract that might be entered into between the company and a third party that you know or are... have an interest in, you would absent yourself from the board when it was discussing that contract and making a vote on that contract.

So, you don't involve yourself. You're transparent, you disclose, and the fact that you've got a conflict of interest is not a problem in those circumstances.

EL So, who is holding boards to account?

KS The individual directors need to hold themselves to account. So, it's a self-regulatory environment, first and foremost.

And then second, it's the relevant regulators. So, ASIC has a role in ensuring that breaches of the law which are brought to its attention are dealt with properly.

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There is a body of rules around the way in which directors behave when they are associated with listed companies, the ASX listing rules.

There are rules that the prudential regulator, APRA, has in relation to the way directors behave and discharge their duties.

So, there's a matrix of responsibilities and of people who will hold you responsible. Anyone who has suffered damage or loss because of your conduct could bring proceedings against you.

EL This all sounds like a pretty big responsibility, but I'm guessing it happens quite rarely in the not-for-profit space?

KS Look, I think, that human behaviour is such that you'll get bad behaviour everywhere. But I think that in the not-for-profit space, you have a lot of people acting with a great deal of good will.

Having said that, there are a lot of people who are also acting in ignorance. And so, it's important for people to make themselves familiar with what their duties and responsibilities are.

EL Katherine Sainty, from Sainty Law. Keep an ear out for the other episodes in this series. You'll find out what an effective board looks like, why having a purpose and strategy is vital, and how to manage risk.

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You can find the full list of episodes at cca.edu.au. This series is produced for Community Colleges Australia, by Heaps Good Media. Engineered by Miles Martignoni, and produced and presented by me, Ellen Leabeater. The podcast has been produced with funding from the New South Wales Department of Industry, to assist the leadership capabilities of adult and community education organisations.

Thanks for listening. If you'd like to know more, visit cca.edu.au.

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