

Not-for-Profit Board Dilemmas
Practical Case Studies for Directors and Executives

Compiled and edited by
Julie Garland McLellan

ISBN

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*“A mind, once stretched by a new idea, never
regains its original dimensions”*

Oliver Wendell Holmes

Praise for Julie Garland McLellan's practical and entertaining board case studies

All Directors are leaders, whether in the private, public or not-for-profit space. All organisations look to their boards for direction, mentoring, support and advice - adding tremendous value to the professionalism of organisations. NFP directors are in a unique position. They are advocates of their cause and many also contribute to their organisations on a volunteer basis outside their role as a board member. What is vital though, is that these directors understand their legal obligations as custodians of their organisation. I congratulate Julie Garland McLellan on successfully highlighting the importance for directors, specifically NFP directors, to practice good governance across all aspects of their organisation in her series of relatable and honest case studies.

John Brogden, MD & CEO of the Australian Institute of Company Directors, Chairman of Lifeline Australia, UrbanGrowth NSW and Furlough House Retirement Village.

This is the book that those of us who serve or have served on NFP Boards have been looking for! It's easy to read, makes what could be a dull and boring topic alive and interesting and will help directors who want to be competent supporters of their cause but not necessarily experts in governance.

Winston Marsh, National President, National Speakers
Association of Australia

The Director's Dilemma case studies are excellent brain teasers for board directors. Like crossword puzzles, Sudoku or any other thought-provoking exercise, these short case studies challenge the readers to explore alternative solutions for directors facing difficult circumstances. Regardless of individual analysis or group analysis of the case, the readers gain significant analytical benefits. Julie used several dilemma case studies to engage an entire audience of corporate directors at a recent forum hosted by the National Association of Corporate Directors in Las Vegas, Nevada USA. It provided an outstanding learning environment. As subscribers, we look forward to reading and analyzing each monthly edition of the Director's Dilemma case study.

Larry Taylor, PhD. - Chairman, The Creighton Group, Inc.,
Board Member, National Association of Corporate Directors
(SoCal), Honorary Director General, Institute of Directors
(India), Board Member, LA84 Sports Institute

Governance is the key driver of performance and accountability for both corporate and not-for-profit Australian companies. Julie Garland McLellan's dilemmas – now gathered together in this publication - challenge us to think seriously about how we think and act as directors. She presents her material in an engaging way, with a degree of clarity that exposes ways of thinking

which will assist both experienced and new directors to fulfil their roles. For the not-for-profit sector, increasing interest in transparency and accountability means that directors must shoulder similar responsibilities to their corporate counterparts. Julie's writing on critical situations that arise around the board table provides a pedagogical framework in a most enlightening and entertaining way. This book is a timely resource and is a welcome addition to director education.

Sue-Anne Wallace, Chair, Australian Council for International Development, and Code of Conduct Chair, Customer Owned Banking Code Compliance Committee

Case studies bring not for profit board issues alive. What I love about this book is that it uses real board dilemmas (with names changed to protect the innocent) and then has 3 experts provide their recommendations on the best way to address the problem. I found it thoughtful and practical, and a resource I know I will revisit in the future.

*Graeme Cowan, Leadership Resilience Author and Speaker,
Director of R U OK?*

Julie's latest book is an engaging, even entertaining, tour of dilemma's faced by directors. It's a nice balance. It avoids being heavy weight-business school style case studies, yet provides sufficient texture to make directors ask "What if?" This is key to

her book, encouraging directors to think ahead to potential problems. This leads naturally to the importance of board members creating – in advance – a structured process to address dilemmas. Julie helps board members to gain domain knowledge. Without domain knowledge, dilemmas turn into quagmires. While Julie’s energy in presentations is not to be missed, her book will keep you thinking.

*Brian Barnier, Board Member, health care non-profit,
Connecticut, USA*

Board members of not-for-profit organisations are first and foremost volunteers. Their payoff is not in money, but satisfaction that comes from many other sources. Prominent among these is the efficient functioning of the board to which they have given their time and skill. In her book, Julie Garland McLellan uncovers many of the challenges that not-for-profit boards can face. Since their resolution has as much to do with people skills as it has with commercial strategy, this is where she has concentrated her case studies and has sought solutions from more than one expert in each example. It is an excellent resource for not-for-profit organisation boards, especially the chairpersons who run them.

*Fraser Beath McEwing, board member, Theme &
Variations Foundation*

I've read probably 90% of the books out there about Boards, and very few really portray the ambiguous nature of the issues that Boards face -- this book does. Other books sometime depict

success in the Boardroom as a matter of following the right procedure. That's like believing there's a procedure for ensuring a high-quality marriage. The case studies in this book should be used for discussions, not only in business schools, but in Boardrooms. High-quality Board members have developed a wisdom -- a sense of high-quality judgement -- and also a humility about that wisdom. This book portrays both.

*Carter McNamara, Co-Owner, Authenticity
Consulting LLC*

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Foreword

By Belinda Moore, CEO, Australasian Society of Association Executives

Many who choose to take on a Board role are often unprepared for the challenges they face and little understanding of what it takes to be a “good” Board member.

I’ve worked with Board and committees of many shapes and sizes for over 20 years. During that time I’ve noticed some key successful factors that seem to reflected in many of the “good” Boards.

Perhaps the most significant factor in the success of a Board is the interpersonal relationships of the Board members. I’ve consistently noted that the most successful Board are those where the Board members have a respectful, open and positive working relationship that welcomes robust and informed discussion.

Those Boards are even more effective when the individual Board members have the governance education necessary to give them the skills to effectively acquit their responsibilities as a Board member. This kind of training can really assist a Board member to maintain the delicate balance between remaining strategic and being thorough enough to maintain appropriate oversight of the organisation.

Beyond a great working relationships and a deep knowledge of good governance practice there is another challenge. There also needs the ability to make difficult decisions and address the variety of ethical dilemmas that crop up from time to time.

For this reason I was very pleased to see Julie compile these excellent case studies into a book format. It is rare to see such a collection of case studies in one location and I congratulate Julie on devoting the time necessary to create this valuable learning tool.

The case studies inside this book are highly practical and provide readers with a unique insight into how they could potentially deal with some of the more challenges aspects of being on a Board. It is a great way to hone your own decision making skills by learning from the experiences and ideas of others. For these reasons I highly recommend reading it from cover to cover.

Belinda Moore

Introduction

If you are reading these words it is highly likely that you are already serving the board of a not-for-profit, or for-purpose, company. That is admirable; the work of board members, staff and other office holders in our not-for-profit (or for purpose) sector is a force for good in our world and a major component of our economy. You are making many good things possible and reducing the potential for much harm.

You are keen to have the best and biggest possible impact on your organisation and the delivery of its important mission. To do that you need excellent judgement.

Judgement comes from experience. Unfortunately you are not working in an environment where you want to learn by making mistakes. Your company, and its purpose, is too important to allow that. You need to learn from the experience of others in a way that is easily transferred to your own unique environment.

You need powerful influencing skills and a repertoire of responses to different situations that allows you to select the best response, first time, every time. You might be right, but if you can't bring the whole board and senior management team to share your views, you may not be able to seize opportunities and avoid risks.

These case studies are designed to give you access to real life situations. Each has really happened to a board and many were

handled poorly by inexperienced protagonists. Rather than train you in the mistakes of others, these case studies set out the situation and then canvas the opinions of a diverse group of experts on how best to proceed. A dilemma involves making a choice. The experts often make different choices because they have been exposed to different experiences, work in different sectors or are subjected to different governance rules. After reading what the experts would do you will have insights that should guide your own choices and improve your own judgement.

The case studies in this book are brief. The answers are deceptively short. Do not be fooled by the brevity; it takes practice to distil complex advice into concentrated solutions. A short answer is more difficult than a long one. Much thought and discussion has gone into preparing concise indications of possible responses.

Protagonists in each dilemma and, in the first instance, the donors of advice on how to approach each solution are identified by their first names. This familiarity is deliberate; these case studies should evoke memories of purposeful friendly conversations between experts. The book is a series of professional conversations in which you may join.

The ideas voiced by the respondents to each dilemma are not the final ruling or definitive correct answer; they are a basis for further thought. Whom do you agree most with? What other aspects would you consider? Why are some responses instinctively rejected and others immediately attractive? What

is your personal judgement? What would you do under the circumstances?

No dilemma has a simple answer. Most have several answers and selecting the answer that will work best is based upon understanding the people, processes and purpose of each board.

Something magical happens when we share ideas and knowledge. The more we give the more we benefit. The more we receive the more we have to give. The contributors to this book have contributed freely, generously and with the sole aim of improving global standards of good governance.

I hope that you will enjoy reading these dilemmas and will develop your own novel solution to each one. Space has been provided for you to write your thoughts after each dilemma.

The dilemmas are sourced from The Director's Dilemma newsletter. Subscriptions to the newsletter are free and available at www.mclellan.com.au/newsletter.html.

Acknowledgements

This book would never have been possible without my newsletter ‘The Director’s Dilemma’. The on-time delivery of each monthly issue and the correct functioning of the technology that makes it all possible is due to Glenn Wilson and the team at Ayuda IT.

The book, and the newsletter, would never be as powerful if it were all my own work. The contributing authors have made this book and its preceding volumes into a comprehensive collection of modern governance thinking. These contributors come from all around the world, some are governance consultants, some are academics, some are practicing company directors, all are experts in their own right and all have given their advice to help advance practical knowledge of the ways in which real boards consider issues and make decisions at this point in time.

The contributors, like the case studies, are international. Each contributor comments from his or her experience in their own legal framework. You need to apply your judgement to the differences between their frameworks and your own. If in doubt contact a specialised legal adviser. Your circumstances may be quite different from those of the protagonists and you should always check your actions to ensure legal compliance with all local laws, regulations and commitments.

Each contributor is identified, together with a very brief description of their background, at the point of their contribution.

The contributors are:

- Jonathan Arthur
- Ken Barber
- Susan K. Becker
- Christopher Bennett
- Linda Bollinger
- Walter Borda
- Steven Bowman
- Sandy Brinsdon
- Dr Robert Care
- Trent Carter
- Andy Cawston
- Dr. Peter Chandra
- Andrew Clearfield
- Kayte Connelly
- Dean Cording
- David Dell
- Grant Downie
- Giovanni Di Noto
- Sheilah Etheridge
- Jane Garthson
- John Groarke
- David B Haddad
- Neelofar Hameed
- Christine Hawkins
- Mark Herbert
- Eileen Herzog
- Edward O. Hunter
- Dr Jack Jacoby
- Anthony Joy
- Mary Legakis
- David Marshall
- Terri L Maurer
- Pankaj Rai Mehta
- Stephen Penberthy
- Patricia Pitsel, Ph.D.
- Anne Riches
- John Shulansky
- William (Bill) Smith
- Dru Stevenson
- Seshagiri Rao Vaidyul
- David Willcox
- Richard Wineberg

The protagonists in these dilemmas are based upon real people with whom I have had the pleasure of working. The dilemmas are altered to ensure anonymity and protagonists' names are changed. I wish I could acknowledge their contributions; this book and the newsletter would not have been possible without all the people who provided 'dilemmas' that inspired the case studies. They know who they are and also how grateful I am.

Index to Case Studies

The following case studies have been designed to allow you to practise your judgement and develop ideas about how to react when things happen in your boardroom.

Each case study has at least three answers provided by experts from around the world with knowledge of the subject matter. Space is provided for your own answer and some questions are suggested to assist you in thinking through the issues and developing your own personal judgement.

The case studies are eponymous with their key protagonist. The following table provides a quick reference into the issues covered in each case study.

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Hans

Hans is a director on the Board of a small not-for-profit. The company had tendered for some government contracts but these are now drawing to a close and were unprofitable. The Board and other donors have provided funds to keep the company going until the contracts expire. They are not able to continue to offer that support and are not confident of their ability to raise funds from external donors once the Board's financial support ends.

The company has failed in its mission and, although the directors and staff are very passionate about the aims of the company, it has become obvious that other companies are better placed to tackle those problems successfully. In particular one competitor has been doing similar work and making a small surplus which provides a buffer. That competitor has tendered for, and won, the contracts that will continue the work Hans' company has been doing.

The Board has discussed the issue and has decided that they should close the company down. The CEO agrees with the decision but is naturally very concerned about the staff. None of the directors or staff have been through a liquidation and they have no idea about the process. The company has sufficient funds to complete its contracts but after three months will have no income in the future.

What should Hans do?

Key Points:

- Directors are potentially personally liable for any debts incurred by the company if it trades whilst insolvent.
- A non-profit company should either make a surplus from its operations, be able to raise funds via donations or grants, or generate an income stream from investments to fund operations.
- If a company appears to be approaching insolvency the board should seek professional financial and legal advice.
- The board must not incur any obligation if it is reasonably foreseeable that the company will not be able to pay its debts as and when they fall due.
- In most jurisdictions the assets of not for profit companies must be given to another not for profit organisation upon winding up; they may not be given to directors, staff or shareholders.
- If fellow directors do not support you in pursuing a course of action to avoid insolvent trading you should leave the board no matter how much you support the aims of the enterprise.

Advice for Hans:

John's Answer

On paper, it is relatively straightforward ... all resources are disposed of, and then the company closed in accordance with the legal and statutory requirements of the jurisdiction(s) where the company operates.

In practice, it is quite hard. My response will deal with the disposal of resources; equipment and infrastructure, consumables, intellectual property, and people.

Some equipment and infrastructure will have been procured under a contract, and these contracts will have to be terminated, perhaps with a payout. Other equipment, infrastructure and consumables can be sold, either by private treaty or by public auction. As these items will typically be sold below book value, they should first be offered to staff (especially ICT equipment that was used in their day-to-day work) or third-party organisations with charitable or socially responsible agendas, before being offered to the wider public. Intellectual property that is unequivocally owned by the company may have a resale value to a competitor. Alternatively, there may be staff members who want to start-up a similar enterprise (individually or in a small group). This new entity should be given the opportunity to acquire the intellectual property at no cost: a write-off for the business and a gesture of goodwill to former employees.

People are the biggest casualty in all of this. If there are funds available to place staff in an outplacement program for at least one month, preferably three months, then that must be arranged. In this case, a competitor exists who will continue the work of Hans' company. If a dialogue can be opened to negotiate the transfer of staff then that must be pursued.

Next, board members should use their connections to find work opportunities for staff. If this is unsuccessful then the board members should be urged to keep in touch with staff, effectively as mentors, until they find work. All this pastoral care will greatly help staff to transition out of the 'old & known' and into the 'new & unknown' ... but it is going to be quite painful for everyone concerned.

Good luck, Hans.

John Groarke is a Principal at JEGMC Strategy Consulting.

Julie's Answer

First Hans should thank the board members who have been putting in funds to allow the company to fulfil its obligations. He should document who is giving support and why the Board believes this support is sufficient to keep the company solvent (able to meet all its debts as and when they fall due) until closure.

Careful cashflow planning is required. Many expenses may arise as the company closes down and, as funding is limited, it is important to identify and plan for all of these.

Next, Hans should identify the options for getting value from the assets. As it is a not-for-profit, under most legal jurisdictions, any surplus on winding up must be given to another not-for-profit. The Board should plan to utilise proceeds from saleable assets to mitigate the need for additional funding. It would be unconscionable to take money from some board members to fund the ongoing operations and then have a cash lump sum when operations finish.

Hans should check the constitution and any other documents that may limit the destination of any surplus on winding up. There may be a liquidation clause in the contract. The directors should decide, when they have all the facts for a good decision, where best to direct whatever small surplus they finish up with.

Hans should also check the Directors and Officers Liability insurance policy. Members, staff, beneficiaries, donors and the client organisation(s) may all feel aggrieved at the failure and wish to hold the Board accountable. A meeting should be organised with the broker to talk through the heightened risks of this period.

It is natural for staff to feel resentful of a competitor that has damaged their job security and sense of professional pride. It may be possible to place key staff with the competitor but Hans should not rely on that. Giving staff as much notice as possible will help them to plan and take responsibility for their career progression. Transition support may be expensive but Hans should investigate the options. Providing written testimonials and two contacts for references will also assist. Many companies restrict references and testimonials but, in these circumstances, the company should attempt to provide staff with all possible support, practical and moral.

Finally, the Board should learn what went wrong and how it could be avoided in future. While they clearly had the best intentions for the company, it is important that they learn and develop through this sad experience so they can confidently add value to other not-for-profits in the future. They have only failed this time; they can go on to succeed again.

Julie Garland McLellan is a specialist Board consultant and practising non-executive Director based in Sydney.

Dru's Answer

In the United States, there are a series of steps involved in dissolving a non-profit organization. The Board must notify two different government agencies, one State and one Federal, as follows:

1. Board Resolution.

The Board of Directors or Trustees for the organization needs to meet, discuss, and adopt a written resolution to dissolve the organization and distribute the remaining assets to other tax-exempt charities (preferably a registered 501(c)3 exempt organization). The resolution should specifically address the distribution of final assets and authorize one person (usually the President or other officer or director) to dissolve the corporation. Follow the requirements of your organization's articles and by-laws for the meeting, the vote, and for dissolution. Retain a copy of this Resolution for your records.

2. Distribute the remaining assets.

After paying all outstanding obligations, checking your insurance coverage, terminating leases, selling tangible or real property, etc., the organization must distribute the remaining assets to other tax-exempt charities, preferably a 501(c)3. You can give the assets to one charity or to several - it does not matter, but keep careful records. Close the organization's bank account(s), and have the bank issue a cashier's check for any remaining funds payable to the designated charity.

3. File a Certificate of Termination

The relevant state government website will have a standardized form (usually 1-3 pages) with instructions about completing the form and where to file it. The state may require you to attach a copy of the Board's Resolution for Dissolution. File the completed form with any required attachments and fees, and wait for the Secretary of State to send a Certificate of Filing (usually a cover letter with your termination form and a stamp or seal from the state government on it).

4. File a dissolution packet with the IRS.

This must include:

- A cover letter that explains the reason for dissolution, and includes the organization's EIN (Employment Identification Number) and DLN (Determination Letter Number);
- The Certificate of Termination filed with the Secretary of State, along with the Certificate of Filing received from their office;
- The list of the last set of Directors/Officers with their daytime phone numbers; and
- A statement signed by the President regarding the final distribution of the assets.
- Send the packet to: Internal Revenue Service, TEGE Correspondence Unit, Room 4024, PO Box 2508, Cincinnati, OH 45201.

Keep copies of every one of these documents for your records.

Dru Stevenson is a professor at South Texas College of Law in Houston, USA.

John's Answer

Hans' non-profit is tax-exempt because of a charitable mission that the legal authorities have concluded will benefit the community at-large. In essence, the Board is responsible to the community, not any shareholders or members. As the entity has failed the mission and has no reasonable means to continue operations, the governing board has correctly decided to complete their contracts and terminate operations.

The legal charter of most organizations include a section on disposition of assets in the event the entity ceases to exist. The Board and CEO should review the corporate charter to determine if there is any overriding guidance or restrictions. Often, the charter directs the Board to disperse assets to any non-profit with a similar charitable mission.

As a board member, Hans should encourage the Board and CEO to adopt a proactive approach to promote an orderly transition of the non-profit's assets to the community, that is, to other providers who might be able to deploy the assets that are intended for community benefit, including personnel, business records, technology, intellectual property, office furniture and so forth.

In periods of retrenchment or repositioning of services, mission-based organizations typically treat personnel (and all stakeholders) in a compassionate and forthright manner. The Board would be well advised to take whatever reasonable and practical steps are available to support their staff as well as assure the dissolution of assets benefits the community. For example, it may be possible to solicit the donation of outplacement counselling or similar support from community resources.

The closing of a non-profit can be sad, but keeping a struggling one afloat, especially when there is little hope of longer term survival, is horrific for staff and worse for the communities being served. Many non-profits would benefit from strategic combinations, such as mergers, joint ventures, or other kinds of strategic alliances that might sustain the service. Boards having the courage and foresight to think in this manner are a rare breed.

John Shulansky is a Principal at Shulansky Consulting and Managing Member, President & CEO at AtlanticJet LLC.

Personal Notes:

Which answer do I prefer?

What attracts me to that answer?

What do I not like about that answer?

What aspects of the other answers would I incorporate into my solution?

What is my solution?

