Governance Institute of Australia

Adding value to governance in aged care

A practical guide for any potential or current member of a board of an aged care provider

January 2019

About Governance Institute of Australia

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are second to none.

Our postgraduate education in applied corporate governance and risk management is unrivalled in its breadth and depth of coverage. It sets the standard for entry into the profession. Postgraduate education is also the gateway to membership of Governance Institute of Australia and the Institute of Chartered Secretaries and Administrators (ICSA) — leading international associations for governance practitioners.

Our Certificates in Governance Practice, Governance and Risk Management and Governance for Not-for-Profits provide skills-based governance and risk management training, and a qualification for a wide range of professionals responsible for corporate accountability functions and processes within an organisation.

Our active membership base of more than 7,000 chartered secretaries, governance professionals, directors and risk managers ensures that Governance Institute is at the cutting edge of knowledge of issues and support of sound practice in the continuous evolution of governance and risk management.

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Foreword

Nearly every Australian will come into contact with the aged care sector at some stage in their lives.

The aged care sector plays a vital role in our social fabric by caring for some of Australia's most vulnerable people. More than one million people currently receive aged care services in Australia — by 2050 it is expected that more than three and a half million Australians will be receiving aged care services as the Australian population ages and advances in medical technology increase Australians' life expectancy.

Boards of aged care providers will be subject to increasing scrutiny and pressures as the forces of demographics press up against the issues of affordability and sustainability in the sector. The aged care sector is currently undergoing wide-ranging and fundamental reform as the Australian Government seeks to introduce a more consumer-directed, market-based model of operation to improve the sector's financial sustainability. Boards will need to ensure that they are capable of making informed and effective decisions and have in place governance frameworks to enable this.

Governance Institute has recognised that it can add value to the aged care sector by developing guidance for the boards of organisations that provide aged care services addressing these challenges and opportunities. Our aim is to utilise our members' deep expertise in governance to provide those who sit on the governing bodies of aged care providers or who are considering doing so with practical and concise guidance on how to deal with the issues challenging their organisations.

Reading this guidance should be mandatory for all new and existing board members of aged care providers in order to comply with their obligations and understand how they can best add value to the governance of their organisations.

I thank our members who have contributed to the development of this guidance and commend it to you.

Rachel Rees FGIA
President
Governance Institute of Australia

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Introduction: What is governance and the role of a director?

A basic definition of governance and why it matters

Governance encompasses the system by which an organisation is controlled and operates, and the mechanisms by which it, and its people, are held to account. Ethics, risk management, compliance and administration are all elements of governance.

Governance can be argued to have five key components:

1. Transparency: being clear and unambiguous about the organisation's structure, operations and performance, both externally and internally, and maintaining a genuine dialogue with, and providing insight to, legitimate stakeholders.
2. Accountability: ensuring that there is clarity of decision-making within the organisation, with processes in place to ensure that the right people have the right authority for the organisation to make effective and efficient decisions, with appropriate consequences for failures to follow those processes.
3. Stewardship: developing and maintaining an enterprise-wide recognition that the organisation is managed for the benefit of its primary stakeholders (including owners/those to whom the services are being provided/families/government and the wider community) taking reasonable account of the interests of other legitimate stakeholders.
4. Integrity: developing and maintaining a culture committed to ethical behaviour and compliance with the law.
5. Risk management: taking appropriate risks and avoiding unnecessary risks where the benefit is insufficient.

Governance hierarchy

- Framework — understanding the components and boundaries. For example, what is the enabling governance legislation for an organisation? From where does it derive its powers?
- Structure — interaction of the components and boundaries in the organisation. All organisations need to understand and document:
  - the identities and roles of key stakeholders (for example, board of directors, executive management, other stakeholders)
  - the powers vested in each stakeholder and the basis on which such powers rest (for example, do the powers arise from legislation, the constitution or other authorising documents?)
  - the reporting responsibilities of each stakeholder and the identity of the stakeholder to whom the reporting obligations are owed (for example, the CEO reports to the board, the board reports to funding bodies, members or the owner of the aged care provider)
  - the extent of board and executive management's decision-making powers respectively.
- Tools — required for implementation and monitoring strategic direction, budgets, and governance and risk management frameworks. A board (and, in particular, the chair) can enhance its efficiency and effectiveness by managing its business, activities and relationships in the following key ways:
  - set meeting agendas, including order of business and agree expectations about boardroom behaviour
  - clarify the benefits of standard board paper formats — identify what the board is being asked to do/agree to
  - ensure the timeliness of the distribution of board papers
  - manage board meetings (and board committee meetings, as appropriate) to allow the board sufficient time to consider issues properly, while ensuring that the business of the organisation is not delayed
  - discuss and agree that board members are expected to have read board papers prior to the meeting; that for information papers, a board member will seek clarification prior to the meeting and that there is little discussion on such papers (unless there is a significant issue identified)
  - ensure agreed actions and outcomes are summarised at meetings
  - ensure the recording of meetings (minutes) and the timeliness of the distribution and approval of minutes after the meeting
  - agree on access to information outside of formal meetings
  - agree on the level of contact with staff other than the CEO
  - agree on any process for directors obtaining independent advice
  - implement a library of board papers for directors.

Power vested in various stakeholders

To assist understanding of the respective roles, an organisation needs to develop policies and charters that set out the structure of authority and responsibility, and the roles attached to those responsibilities. The roles include:

- board (including chair, independent and representative directors)
- CEO (and executive management team)
- company secretary.

Delegation of authority

An essential part of good governance is the distinction between authority, which can be delegated, and responsibility, which cannot. Directors, the CEO and staff are all accountable, but for different aspects of the organisation and to a different extent in each case.

A board of directors is responsible for the governance of the organisation: they cannot abdicate that responsibility. There will usually be a clause in the constitution or constituent document that allows the directors broad ability to delegate their collective powers, but not their responsibility, to others. They may delegate that authority, for example, to the CEO and executive management team and ought to do so systematically. However, the responsibility remains with the board, and the directors are accountable for any failure of the system to operate as it should.

The role of the board

The role of the board is to provide leadership by setting the organisation's aims in light of the constitution, determine the strategic objectives and direction of the organisation and monitor management to ensure those goals are implemented in a timely and accountable fashion.

The directors rely on management to manage the organisation.

Non-executive and executive directors

A non-executive director is not part of the executive management team and is independent of management. A non-executive director is not employed by the organisation even though they may receive fees for their services.

An independent non-executive director is not only not employed by the organisation but also has no relationship with the organisation other than being a director (for example, they don't have a material business relationship or close family ties with the organisation). It is good governance for a majority of directors on a board to be independent non-executive directors.

An executive director, for example a CEO or managing director, is an employee of the organisation and the person to whom the powers of daily management of the organisation's business have been delegated.

The unique challenges of governance in the aged care sector

The Commonwealth government subsidises the provision of three different types of aged care services:

1. home and community care which provides entry-level basic support for older people who need assistance to live independently
2. home care which provides care to older people living at home
3. residential care which provides accommodation and support for those who choose to live within residential aged care facilities.

The provision of aged care also operates alongside other services and sectors such as health and medical services and retirement villages.

This guidance is aimed at current or potential members of a board of an organisation that provides aged care services. Organisations that provide aged care services to older Australians may also provide services in retirement living and under the National Disability Insurance Scheme (NDIS). While occasional reference is made throughout this guide to retirement villages and the NDIS, as part of a general discussion of the strategic issues facing operators of aged care providers, the governance issues facing operators of retirement villages and those providing services under the NDIS are outside the scope of this guide.

The aged care sector is a significant part of the Australian economy. The sector employs around 350,000 aged care staff across approximately 2,000 aged care providers.[1] It is anticipated that the aged care workforce will soon be one of the largest in Australia.

More than one million people currently receive aged care services in Australia — by 2050 this number is expected to rise to more than three and a half million Australians.[2] There are currently 5,232 aged care services provided by a mix of religious groups, local government, community-based groups, state governments, charitable organisations and private incorporated bodies. The majority (about 65 per cent) of aged care services are supplied by not-for-profit service providers.[3] It is estimated that 64 per cent of residential providers are single-facility operators.[4]

The aged care sector is currently undergoing significant change. This change is being driven by the Australian Government, which is seeking to reform the sector to achieve a sustainable, consumer-driven and market-based system of care. The government reforms are aimed at creating a more flexible system of aged care which will respond to the increasing diversity of consumers' care needs, preferences and financial circumstances together with a move towards a user-pay system where appropriate.

An increase in consumer choice, which requires consumers to contribute to their care costs where they can afford to do so, also brings with it increased consumer expectations concerning greater choice and control. The reforms of the sector significantly affect aged care operators and create unique challenges for their boards.

The government's *Aged Care Roadmap* is an important document for boards to understand, given that the concept of consumer-driven care is fundamentally changing the environment in which the aged care industry operates. The Australian Government is also deregulating the funding of services in aged care, requiring consumers to pay more for their care with the government acting as a 'safety net' to ensure services are available and accessible to those in need.

Consumer-driven model of care

Providing consumer-driven care is a key feature of the *Aged Care Roadmap*. It is a way of delivering services that allows consumers to have greater control over their own lives by allowing them to make choices about the types of care and services they access and the delivery of those services, including who will deliver the services, where and when. Families and consumers are encouraged to be more proactive in preparing for future needs and government policy aims to empower them to do so. Consumers will be required to contribute to their care costs where they can.

Changing the model of care towards a user-pays system is a fundamental change for many aged care providers. As consumers are required to pay more they will become more demanding as to the type and standard of care they receive. Changes in lifestyle expectations will drive changes in consumer demands in the future.

Large-scale organisational change will be required in terms of workplace arrangements, staff roles, IT, business processes and capital expenditure in order to deliver consumer-driven care. Boards will require a greater diversity of skills to deal with these changes. They will need to ensure that they have members with skills beyond legal and finance experience in order to meet these new challenges.

A new director on the board of an aged care provider will need to ascertain the strategy that the board has in place for meeting the challenges posed by consumer-driven care. What

1 Deloitte Access Economics, Australia's aged care sector: economic contribution and future directions 2016

2 Australian Government, My aged care website

3 Deloitte Access Economics, Australia's aged care sector: economic contribution and future directions 2016

4 Australian Government Aged Care Financing Authority, Annual report on the funding and financing of the Aged care Sector 2016.

is the provider's strategy for marketing and sales? Does it have a digital marketing strategy and does it have a workforce plan which can provide the services which consumers want?

Market-based system

Moving to a market-based system is a key feature of the *Aged Care Roadmap*. Existing providers will be subject to competition from new entrants. Operators will move from a near monopoly to an open market. An example of how the market-based system will work is the recent deregulation of home care packages which enables providers to apply to the Commonwealth government to offer home care packages as part of a large-scale expansion of aged care into the home. Funding for home care packages will no longer be paid to the aged care provider but will follow the consumer. Clients can go to any provider of their choice. This is a significant change from the previous system where control of the amount of care provided to a client resided with the provider.

The way in which organisations will be affected by these reforms will depend upon the services they provide. An organisation may provide different types of aged care services across different sites. They may provide residential aged care, home care, community care and also operate retirement villages. An organisation that only provides residential aged care services may have its operations affected adversely by the expansion of home care, as consumers who would otherwise take up a bed at an aged care facility decide to have aged care services delivered to them in their home. Organisations that deliver home care may find themselves subject to increasing competition from new entrants. Increasingly, retirement villages, which are currently regulated at state level and operate outside of the Commonwealth aged care framework, will form part of the system of aged care, as consumers access home care delivered at their place of residence. Operators of retirement villages may consider becoming providers of aged care services by way of home care or may form alliances with aged care providers in order to offer integrated services.

People are preferring to stay at home longer with the support of home care services and are entering aged care much later in life with increasingly complex health care needs. Consequently, their medical and clinical care needs are more complex and acute. The needs of older Australians will also become more diverse as a large number of 'baby boomers' enter old age.

Boards will need to:

- consider critically the services the organisation provides
- be aware of how changes to the regulatory framework and changes to consumer demand will affect the organisation
- understand the key assumptions which underpin the organisation's value proposition and the key budget assumptions
- ensure the aged care provider has a robust strategy in place which differentiates them from their competitors
- ensure the business has the capabilities and resources to achieve any revised strategy
- exhibit the transformational leadership which may be necessary in some organisations to drive the significant investments required in people, systems and infrastructure in order to respond to the need to deliver services more efficiently and effectively with decreased government funding
- exercise increased flexibility in strategic planning. By way of example, flexibility may need to be built into the master building plan to allow buildings to be modified at a later date for different uses due to a change in demand for services
- be aware that while the move towards a market-based system contains risk, there are also opportunities for organisations with the right strategy to increase market share. They may need to consider how to generate revenue from other sources to make up for shortfalls in government funding in other areas. They may consider expanding into the provision of home care packages or community care in order to take advantage of opportunities.

Workforce issues

Working towards a well-led, well-trained workforce is a key feature of the *Aged Care Roadmap*.

Staff attraction and retention, workplace health and safety and workforce planning are big issues for aged care providers.

There is currently a workforce and skills shortage in the aged care sector. In 2010, the then Department of Health and Ageing estimated that the aged care workforce would need to increase between two and three times before 2050 in order to provide care to the growing number of aged care residents and fill shortages from the existing workforce due to retire during this period.

In addition to demographic changes that lead to workforce shortages, the shift to a consumer-driven care model increases the demands on the workforce. A more responsive and flexible workforce will be needed to ensure consumers can access the type of care they want as and when they want it. In addition, the increased number of patients with dementia who live in aged care requires staff with different capabilities to deal with dementia issues.

The aged care industry is highly labour intensive and as a result the costs of labour are significant. Aged care providers often have to compete with employers in other sectors such as health care that can offer better rates of pay. Attracting staff in regional and rural areas can be challenging, due to the smaller pool of potential applicants. The shortfall in applicants in the industry is often filled by migrants for whom English is their second language. There can also be a reliance on a workforce that is not necessarily skilled.

All of these factors need to be considered when undertaking workforce planning. Boards need to consider if there is likely to be a gap in the organisation's duty of care obligations.

Another factor that may affect workforce planning for aged care providers is the introduction of the NDIS. The planned increase in disability services may draw workers from other sectors, with the aged care sector holding the most relevant skills for such roles, and this too may deplete the pool of potential applicants.

Aged care involves a great deal of manual work, for example, the lifting of patients. This gives rise to the risk of work-related injury to both employees and patients. Other health and safety risks are posed by dementia patients who can become violent towards their carers. Over 53 per cent of people living in aged care homes currently have a diagnosis of dementia, as set out in the *Aged Care Roadmap*.

Each of these issues will present challenges to boards of aged care providers in the way they deal with their oversight of workforce training and planning. Directors have legal obligations to ensure that the aged care provider has arrangements in place to comply with workplace health and safety obligations under the various workplace health and safety legislation of the states and territories. Directors have a duty to exercise due diligence to ensure that the provider fulfils its obligations. Directors will need to have an up-to-date knowledge of these important statutory obligations and obtain an understanding of the operations of the provider and the risks involved.

The increase in home care packages means that, for those organisations providing home care, there will be a greater proportion of employees entering client homes to deliver care. Employees usually work singly when they deliver care to people at home. There will be a responsibility on the organisation to ensure there is a risk assessment undertaken on the home in which the care will be delivered as well as on the circumstances surrounding the employee's travel to and from the home.

Regulatory compliance

Aged care providers care for some of Australia's most vulnerable people. By the time people enter aged care they are often acutely unwell and frail. Many patients are being administered with medication. As such, an aged care provider's population carries the risk of any infection that may take hold in a facility becoming a material business risk. Hygiene therefore is a serious issue. Matters such as:

- safe food handling
- infection control
- drug resistance
- medication management
- incontinence, and
- hand washing

are examples of some of the areas of concern in the aged care sector, and areas where board oversight of management controls is required.

The *Aged Care Act 1997* requires aged care providers to meet certain requirements relating to the provision of care and services and to satisfy certain standards. The Department of Health has the responsibility for monitoring and assessing providers and taking action against them. The Australian Aged Care Quality and Safety Commission currently assesses and monitors aged care services against the 'accreditation standards' detailed in the *Quality of Care Principles 2014* (Standards). As of 1 July 2019 the new *Aged Care Quality Standards* will replace the *Accreditation Standards, Home Care Standards, National Aboriginal and Torres Strait Islander Flexible Aged Care Program Quality Framework Standards* and the *Transition Care Standards*. All operators will be assessed against these new standards from this date. If the Quality and Safety Commission identifies non-compliance it informs the department and requires the provider to address the non-compliance. The department also receives information about non-compliance from:

- observations and reports from other agencies or regulatory authorities such as hospitals and paramedics
- public information such as media reports and letters to members of parliament and to the department.

Sanctions can include:

- revoking or suspending approval as a provider of aged care
- restricting approval to existing services or places

The board will need to consider the following issues as part of the board's oversight of compliance:

- Internal policies are essential to assist employees to understand the compliance obligations of the provider.
- Legislative requirements should be considered as a minimum standard and directors should be satisfied that compliance settings are at an appropriate level which minimises breaches.
- The provider may require a compliance plan which considers the regulatory framework and a stand-alone compliance committee.
- A dedicated compliance officer may be required or, if not appropriate to the circumstances of the provider, the board needs to ensure that there is both empowerment and accountability at a suitable management level.
- There must be clarity as to the reporting lines, including how reporting on compliance to the board interacts with reporting on risk management and legal reporting.
- Consideration needs to be given to the interaction of compliance policies and programs with other policies such as those on whistleblowing and fraud.
- There needs to be a suitable escalation point to inform the board and relevant regulators as appropriate should breaches of compliance occur.

See *Good Governance Guide: Compliance.*

- restricting funding to existing care recipients
- prohibiting the charging of accommodation charges, accommodation bonds or accommodation payments, including Refundable Accommodation Deposits (RADs), and daily accommodation payments (DAPs).

The Standards require the management of an aged care provider to have systems in place to identify and ensure compliance with all relevant legislation, regulatory requirements, professional standards and guidelines. A culture of compliance with legislative requirements surrounding the health and safety of patients is the ultimate responsibility of the board. The board and senior management need to demonstrate a commitment to a compliance culture and embed compliance in the entity's processes and procedures.

Financial issues

Implications of government policy

Aged care is provided by a combination of for-profit, not-for-profit and government service providers, with the majority of aged care services being provided by not-for-profit entities. This is particularly the case in rural areas where 64 per cent of providers of residential aged care are not-for-profit.[5] The number of Australians who will require aged care is due to significantly increase. Expressed as a percentage of Australia's total population, 23 per cent of the Australian population is forecast to be 65 years and over by 2054–55 and, most notably, the share of Australians aged 85 years and over is expected to be around five per cent of the total population by the same time, up from two per cent in 2014–15.[6]

As outlined earlier, the manner in which the government funds aged care is undergoing significant change, with consumers who can afford it being required to contribute towards the costs of their care. Government funding to aged care providers is being reduced to take into account the increased amounts which consumers pay. Aged care providers may be vulnerable to changes in government policies, that affect the subsidies paid to consumers and in turn the amounts which consumers can be charged by aged care providers. Aged care providers have to ensure that their financial model can withstand changes in government funding regulations and changes in consumer behaviour.

Director responsibilities

A director on the board of a company limited by guarantee in the not-for-profit sector is subject to the same duties under the *Corporations Act 2001* in relation to insolvent trading as a director of a for-profit operator. Directors of charitable bodies are subject to regulation by the Australian Charities and Not-for-profits Commission (ACNC) and have obligations to responsibly manage the charities' financial affairs and to not allow the charity to operate while insolvent. The members of boards or management committees of incorporated associations have similar duties.

Board members of for-profit and not-for-profit organisations must clearly understand the provider's finances, balance sheet and the sensitivity of the business to changes in the funding model. Ensuring the solvency of the provider must be top of mind for directors, particularly if the aged care provider is experiencing financial difficulties.

5 Australian Government Aged Care Financing Authority, *Financial Issues affecting rural and remote aged care providers 2016*.

6 Australian Government Aged Care Financing Authority, *Fourth report on the funding and financing of the aged care sector 2016*

An important financial issue which is particular to the aged care sector is that of management of accommodation bonds and RADs. Issues for a board to consider include:

- As part of discharging its obligation of stewardship, the board will require confidence in the controls that management has put in place to prevent fraud and to ensure that the provider complies with the regulatory requirements surrounding the treatment and management of the accommodation bonds and RADs. For example, multiple facility operators will need to have controls in place to ensure that RADs are used only to fund aged care operations. An aged care provider that also operates a hospital cannot use the RADs to fund the hospital.
- The board must also have confidence that the financial management of the organisation allows for a RAD to be repaid when required and this obligation does not negatively affect the organisation's cash flow. This can pose challenges to providers who rely on the RAD to fund capital works.
- A change in consumer behaviour which affects the management of RADs will be the uptake in home care packages by those consumers who wish to 'age in place' and who do not enter an aged care facility until they are much older. When residents enter an aged care facility at an older age their length of stay shortens, which leads to more frequent calls on RAD repayments.

Other financial issues that boards need to consider include:

- impairment of bed licences — the value of bed licences is carried on the balance sheet, and changes in public policy affect their value
- there will be competition from more suppliers in the provision of home care services — these suppliers will not be constrained by bed licences, but existing aged care providers may still be constrained by bed licences
- prudential requirements in relation to holding accommodation bonds and RADs
- the costs of refurbishing facilities and how their organisations will source funding for such refurbishment
- the *Aged Care Roadmap* carries the aim that providers eventually set and publish their price for accommodation and everyday living costs
- cashflow implications for providers of home care services — under the home care reforms, a client with a surplus balance on their account who decides to leave their provider can take their balance with them to a new provider. This means that their original provider will be required to pay back the client's surplus. There is also the possibility that government subsidies will be paid at the end of the month rather than at the beginning of the month.
- understanding the government funding model and adapting to changes made to it, particularly in relation to any reduction in government funding.

Transition to a more competitive environment with less reliable funding from government requires boards to consider different strategies for improving financial sustainability. These can include:

- looking for additional revenue streams — providers may consider offering additional services such as respite, lifestyle and home care services
- entering into partnerships with other service providers to offer additional services to new customers or improve the services they provide to existing customers. For example, retirement village operators may form alliances with aged care providers to offer home care packages in a retirement village setting or co-locate retirement village and aged care accommodation on the one site
- consolidation with other aged care providers — as outlined earlier, nearly 65 per cent of residential aged care providers operate single facilities[7] and government policies on aged care are clearly aiming for mergers of providers in order to achieve economies of scale. It is important for directors to remain focused on their duty to act in the best interests of the organisation, and not allow self-interest to determine decisions which may see them lose a board position. Boards need to be aware of the challenges which come with mergers and joint ventures and should conduct due diligence into the culture and capabilities of any potential joint venture or merger to ensure a likelihood of success.

Information technology (IT)

IT systems improve the efficiency and capacity of organisations. The cost of implementing new IT systems and upgrading existing ones can be a large cost burden for aged care providers, particularly smaller, not-for-profit operators. Larger aged care providers may have a board committee which deals with IT issues or a board member with IT expertise to assist with the oversight of IT management. This may not

7 Australian Government Aged Care Financing Authority, *Factors influencing the financial performance of residential aged care providers, 2015*

be the case with smaller aged care providers, that may not have the resources to manage the digital responsibilities of data security and privacy, as well as medication management, payroll, financial accounting or the tracking of RADs.

While IT systems are operational and the responsibility of management, they can also be strategic, given their role in allowing the organisation to report effectively at any given time. Providers with a lower-than-ideal level of digital literacy and technological maturity may find this limits their ability to compete in a contestable market.

With reduced government funding in the future, the need to find cost savings will be necessary through more efficient and effective business processes and practices. Investing in IT may be a means to achieve this.

Caring for vulnerable people

Aged care providers care for some of the most vulnerable people in our community and are subject to a high level of public scrutiny. Placing a loved family member into aged care is a difficult decision for many families. It is a process which is surrounded by many sensitivities and issues particular to the sector, such as the use of powers of attorney and guardianship orders by family members to make decisions for their loved ones. Maintaining the good reputation of an aged care provider is vital to the success of its continuing operation, as it influences occupancy, income, resident feedback, ongoing accreditation and staff turnover.

Reputation is reliant on the decisions of the leaders of the organisation and the culture they create and model. Change increases the risk to an organisation's good reputation.

Taking a position on the board of a provider in the aged care sector

If you are invited to be on the board of a provider in the aged care sector, what are the issues you should consider before accepting?

Governance in the aged care sector is a specialised area that has its own challenges and interests. Regardless of whether you are already an experienced corporate board member, a member of the community with an interest in the sector or from a representative body, the issues you will need to consider are unique to each appointment and require consideration before you take a role as a member of the board of a provider in this sector.

It can be flattering to be asked to join a board. However, there are duties and responsibilities that are attached to a board position. Potential directors should familiarise themselves with the legal obligations and potential liabilities which come with the acceptance of a board position. Undertaking due diligence on the organisation will be vital to your experience as a board member. A potential board member should also consider if they have the required time and the right set of skills to add value to the organisation.

Each aged care provider will have its own distinct vision and set of values. Some will be operated on a for-profit basis while others will be not-for-profit entities. The owners or members of the aged care provider may not always be immediately obvious, and may be a religious institution, charity, local council or state health department. It is always essential to have a good understanding of who the owner is as this affects many aspects of how the board functions, such as who has ultimate decision-making authority. It is always essential to have a good understanding of whether the board is a decision-making body or advisory and what its authority is.

Due diligence

The constitution or constituent document is the overarching document that informs the board as to:

- the legal structure of the aged care provider — for example, it could be a company limited by guarantee, a subsidiary of a public listed entity, an incorporated association or a government-owned entity (the legal structure identifies some of the obligations and constraints placed on the board)
- its relationship with the owner(s) — to whom is the board accountable?
- how the owner delegates authority to the board (this may not be in the constituent document but may be in a separate document).

Members of a board of an aged care provider will need to be familiar with this document.

It is important for a director to bring independent judgment to their role on a board. It is therefore essential that a prospective director make their own independent enquiries of the aged care provider before accepting a position on the board. A potential director's due diligence should be focused on obtaining information on the organisation's purpose, strategy, operations, finances, culture, key risks, employees and reputation.

One of the most important areas of due diligence is on the functionality of the board and in particular the effectiveness of the chair. It is important for a prospective director to discuss issues of board effectiveness with the chair and to have absolute confidence in the ability of the chair to direct the board's workings. It is wise to ask what time commitment will be required to attend board meetings and board committee meetings, as well as time spent preparing for meetings. There may also be other less formal expectations, such as attending volunteer and staff functions. This information may be obtained from discussions with the chair or other board members.

It is good governance for a prospective director to make independent enquiries of the organisation so that they are not solely relying on information provided by the board. Informal discussions with other industry participants can be a useful way to obtain background information and insights into an organisation. A Google search is a starting point to reveal if there are any reputation issues that have arisen in relation to the provider.

Checklist of information a potential board member should receive or request

A checklist of the documents or information you should ask to see includes:

- the most recent audited financial statements — you need to understand:
  - the position concerning RADs and accommodation bonds, including whether there is sufficient capital to pay these out as required
  - other financial commitments such as capital expenditure
  - the revenue, including revenue streams to offset any potential loss of government funding
  - bed licences and the number on the waiting list (and vacancy rates), which speaks to expectations of future revenue
  - any borrowings (for example, to construct new buildings, but which bring with them debt that needs servicing) and any banking covenants in relation to bank financing

- the pricing scheme, if the provider is part of the NDIS
- cash reserves held
- access to funding including owners' capital
- government funding model
- who the external financial auditors are and whether the accounts have been qualified
- the cash position and solvency, particularly whether the entity has the capacity to pay its debts as and when they fall due
- if the entity has exposure to any contingent liabilities and if so what circumstances need to exist to trigger the liability (for example, government grants that may require repayment if certain events do/don't occur)
- if there is evidence of testing for impairment of assets (especially intangible assets like bed licences, if applicable)
- any related party transactions and the transparency about them, that is, are they 'arms-length transactions'?

• details of each of the facilities and services operated by the provider (which could be under a confidentiality deed) including:
  - what business streams does the entity operate in, for example independent living, home care services, residential aged care, disability services, allied health
  - locations
  - finance
  - the number of beds and occupancy rates
  - staffing qualifications and ratios
  - workplace, health and safety statistics
  - complaints, investigations or legal cases which are pending (which represent contingent liabilities), including those being dealt with by the Aged Care Complaints Commissioner and those brought by workplace health and safety regulators and the Fair Work Commission
  - staff survey results
  - resident or resident family survey results
  - the results of the most recent Australian Aged Care Quality Agency reaccreditation assessment, including whether the provider failed to meet any accreditation standards (for example, failure to meet duty of care or other sanctions), details concerning any regulatory notices issued by the Agency and the outcome of any timetable for the improvement process
  - details of and outcomes of any unannounced visits from regulatory bodies
  - site occupancy and wait lists, as this will give an indication of demand for services and reputation in the market place

• the last annual report/half-year report
• the organisation's taxation status if a not-for-profit provider
• the business/strategic plan for the organisation, with a four to five-year financial forecast
• the constitution or constituent document of the organisation
• the insurance environment, including whether directors' and officers' liability insurance is in place to cover board members, including a deed of access and indemnity
• brochures or prospectuses for the aged care facilities provided to prospective residents
• recent board minutes or at least a discussion about board matters with the chair
• the board charter and the charter for any board committees or, if these documents are not available, information about the responsibilities and operations of the board and how they interact with management
• the biographies (in summary form) of the other directors, so that you have an understanding of who will be sitting on the board with you and what skill set and experience they bring to the role
• details of board tenure and term limits — how is board succession dealt with?
• an organisational chart and biographies of the executive team
• details of the current length of service of the chair and the CEO — are they new, or have they been in place for many years?
• board and board committee meeting dates and an indication of time commitment
• results of the most recent board evaluation, or if this information cannot be provided due to confidentiality reasons, general information from the evaluation process about board effectiveness as a whole
• results of the most recent performance review of the CEO
• key policies and procedures such as whistleblowing, code of conduct, media, bullying, grievance and privacy
• the risk register — or if this information cannot be provided due to confidentiality reasons, information on the key risks and challenges facing the organisation.

It will be necessary to ask what kind of skill set you can contribute to the aged care provider and in what capacity the board has asked you to become a member. What skills is the board looking for that it believes you bring to the role of director? How does this complement/extend the skill set of the existing directors? The requirements for certain board skills may be different for a single facility not-for-profit aged care provider in a small town from those of a private provider operating multiple facilities in a metropolitan area.

Ideally, a board member should exhibit the following characteristics:

- a strong sense of ethics
- high levels of integrity, and confidentiality
- diligence
- ability to assess risk
- commitment to the organisation
- coordination with the board's articulation of the values and vision
- strong communication skills
- ability to establish and develop quality relationships and relate to a wide range of people
- strong analytical and problem-solving skills
- ability to think strategically and critically
- financial analytical abilities
- an ability to fill an identified skills requirement on the board
- be able to make the hard decisions required of them.

Secretariat support

Appropriate administrative and secretariat support for the board is integral to ensuring that its operation remains efficient and effective. A potential director will need to ask about the secretariat support which is provided to the board. It is good governance for the company secretary to have an independent role and a direct reporting line to the board via the chair. If the organisation cannot afford an independent company secretary, thought may be given to engaging a secretary on a contract basis.

It is also considered good governance for organisations to appoint separate persons as the CEO and the company secretary of the organisation. While it has been the practice in some organisations, particularly not-for-profit organisations, to appoint the CEO as the company secretary, it is good governance for another member of the management team to fulfil the secretarial role if a dedicated appointment is not made or an external provider contracted.

See *Good Governance Guide: Issues to consider for a chief executive officer who is also appointed as the company secretary.*

The regulatory environment

Aged care may be an unfamiliar regulatory environment for the prospective board member, but issues of regulatory compliance and director liability must always be considered.

As noted earlier, aged care providers operate in a highly regulated environment that is currently undergoing significant reform. The Aged Care Act provides a legislative framework for Commonwealth-funded aged care services. The *Aged Care Principles* provide specific details about what is required or permitted under the Aged Care Act. Potential directors of an aged care provider will need to educate themselves on the legislative framework surrounding aged care as they are considered to be key persons for approved provider purposes under the Act.

Directors can obtain information from the following sources:

- discussions with the chair and CEO
- government websites and publications, including:
  - information directed at consumers, their families and carers can be found on the My aged care website at www.myagedcare.gov.au. This operates as the entry point into the aged care system
  - information aimed at service providers is located on the Commonwealth Department of Health website at www.agedcare.health.gov.au. Directors should familiarise themselves with the legislation, particularly the Aged Care Act and the *Aged Care Principles*, government information sheets on various matters including the prudential arrangements for accommodation bonds and payments, RADs and DAPs
  - information relating to the legislative framework, such as: *Caring for Older Australians, Productivity Commission Report 2011*, the *Australian Government Response to the Productivity Commission's Caring for Older Australians Report* published in May 2012 which contains details of the Living Longer Living Better reform package as well as the *Aged Care Sector Statement of Principles* (published in 2015) and the *Aged Care Roadmap* (published in March 2016)
- industry publications such as *Australian Ageing Agenda*
- publications and information issued by peak organisations such as National Aged Care Alliance, LASA, COTA Australia, Catholic Health Australia and Aged & Community Services Australia.

Legal obligations of directors

The legal structure of the organisation has implications for the governance framework and the statutory duties and liabilities of a director both at a Commonwealth and state level.

The Corporations Act imposes a number of significant statutory duties on directors and other officers. These duties include:

- the duty to act with reasonable care and diligence (s 180)
- the duties to act in good faith in the best interests of the company and for a proper purpose (s 181) and
- the duty not to improperly use their position or information (ss 182 and 183).

Importantly, the common law imposes fiduciary duties on directors which prevent directors using their position to obtain personal advantage. Directors must act in good faith and in the best interests of the organisation and for a proper purpose. These fiduciary duties overlap with the statutory duties imposed on directors under the Corporations Act, state or territory associations incorporation acts if the organisation is incorporated, or the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) if the organisation is a registered charity. They can be classified under four headings:

1. to act bona fide in the best interests of the company
2. to exercise powers for a proper purpose
3. to retain discretion
4. to avoid conflicts of interests.

This can be summed up as the board and management managing the organisation for the benefit of its members or its cause, depending on the nature of the organisation, while taking reasonable account of the interests of other legitimate stakeholders. The board and management should not be managing the organisation for their personal benefit.

Directors are subject to the business judgment rule. A business judgment is 'any decision to take, or not to take, action in respect of a matter relevant to the business operations of the corporation' (s 180 (3)). It provides a 'safe harbour' for directors who act in good faith in relation to their duty to exercise care and diligence. Directors who make a business judgment will be taken to meet the requirements of the statutory duty of care and diligence (and equivalent fiduciary and common law duties) if they:

- make the judgment in good faith and for a proper purpose
- do not have a material personal interest in the subject matter
- inform themselves about the subject matter to the extent they reasonably believe to be appropriate
- rationally believe that the judgment is in the best interests of the company.

The rule will only apply:

- where a claim is made that the director has breached the statutory duty of care and diligence
- to those decisions relevant to the business operations of the company (business judgments) which include, among other things, acquiring and disposing of assets, creating business plans and budgets, and obtaining credit
- to decisions of directors.

A defence under the rule is not available where no decision is made or where the process leading to the decision is defective (such as where the decision is made on the basis of clearly inadequate information).

Directors also have a statutory duty under the Corporations Act to take action in a timely manner to prevent their company trading:

- while it is insolvent or
- where there are reasonable grounds for suspecting that the company is insolvent or will become insolvent if the company incurs a particular debt.

Governance Standard 5 applicable to all charities under the ACNC Act covers the duties of responsible persons, which mirror to a large degree the duties of directors under the Corporations Act. They include the duty to:

- act with reasonable care and diligence
- act honestly in the best interests of the charity and for its purposes
- not misuse the position of responsible person
- not to misuse information obtained in performing duties
- disclose any actual or perceived conflict of interest
- ensure that the charity's financial affairs are managed responsibly
- not allow a charity to operate while insolvent.

Charities must take reasonable steps to make sure that responsible persons are subject to, understand and carry out the duties set out in this standard.

Directors also need to be aware of the responsibilities of key personnel (which includes directors) under the Aged Care Act, which include responsibilities approved providers have regarding the quality of care they provide; the rights of those receiving aged care; the sanctions that can be imposed on approved providers; responsibilities of providers to protect personal information; and the record-keeping obligations of approved providers.

There are also parts of state and territory legislation that extend responsibility and also contemporary cases that extend liability to directors. In most states' and territories' legislation, duties are imposed on persons in control of workplaces to ensure the protection of workers and others in the workplace. Most of these jurisdictions provide that directors and other officers and other persons concerned in the management of the company may be held personally liable for breaches of workplace health and safety legislation.

In addition, directors and other officers have significant responsibilities under other Commonwealth and state legislation, as well as local government rules and regulations. Competition and privacy law, as well as the large bodies of taxation and environmental laws (both federal and state), for example, not only require observance but also have increased statutory reporting responsibilities.

It should also be noted that there are additional responsibilities for incorporated association entities under state-based Incorporated Association Acts. Those entities operating in retirement living will be subject to state-based Retirement Living Acts. In both cases, there may be differences between the various state-based acts which will impact those entities operating in different states and territories.

Issues which a board should consider when inviting a new member onto the board of an aged care provider

Does the new board member have skills which the board needs?

Board renewal is critical to performance. It is good governance for the board of directors to regularly assess the composition and effectiveness of the board as a whole, as well as any upcoming need for new directors, which will include a review of the required mix of skills, experience and other attributes of directors. Periodic board evaluation is an ideal time to assess the board's composition and develop a board skills matrix.

Board evaluation can provide a board with meaningful information as the basis for improvement, and will assist in optimising board performance and effectiveness. A formal, independent and periodic evaluation not only involves examining past and current performance, but also has a strategic focus in looking forward at how the board can add further value to the performance of the organisation. This is also an opportunity for directors to indicate areas for the individual and collective development of skills and knowledge.

A useful tool to assist the board in determining the right mix of directors and understanding its renewal needs is a skills matrix. Creation of a board skills matrix identifies the skills, knowledge, experience, diversity and capabilities desired of a board to enable it to meet both the current and future challenges of the entity. It is also an opportunity for considered reflection and productive discussion on how the board of directors is constituted currently and also how it believes it should best be constituted in the future to align with the strategic objectives and needs of the entity. Board renewal enables new ideas and perspectives to be introduced. Consideration of the skills matrix may also assist a board to avoid the lack of diversity in thinking and perspective which can occur when boards select from their friends and acquaintances who are often the same type of people as they are. The board skills matrix functions as a risk management tool for the board. All directors should have a certain level of financial literacy as monitoring the financial performance of the organisation is a key responsibility.

Board tenure can also be considered when creating a board skills matrix. It is important for the board to consider the 'fit' of any potential director when considering new board appointments, not just in terms of skills, experience and knowledge, but also in terms of the new director having the time to commit to fulfilling expectations and responsibilities. Discussion with others who have worked with the potential director can also inform any decision concerning appointment, as their capacity to engage in collective decision-making needs to be considered.

Even the board of a small aged care provider without resources to support it needs to actively consider gaps in terms of current and future strategic requirements and take responsibility for ensuring that board appointments meet these requirements.

See *Good Governance Guide: Creating and disclosing a board skills matrix*, *Good Governance Guide: Matters to consider in the selection and nomination of directors* and *Good Governance Guide: Board structure — Not-for-profit sector*.

Independence

It is good governance for a board to have a majority of independent, non-executive board members, who do not maintain another role within the organisation, and do not have a material business relationship with the organisation. While public listed companies are required to report against the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* (3rd ed) when assessing criteria for independence, it is good governance for all aged care providers to consider the criteria set out in the Principles and Recommendations as a guide to assisting the board to ensure that directors bring independence of judgment to their decision-making and that board appointments do not introduce either real or perceived conflicts of interest which could cause stakeholders to doubt the independence of board decision-making.

If board members are affiliated with an organisation that provides professional services to the organisation, or if they represent the owner of the aged care provider, it is important to put in place protocols so that they make decisions as a director, rather than as a professional services provider or representative, including a process for managing conflicts of interest.

See *Good Governance Guide: Conflicts of interest in not-for-profit organisations*, and *Good Governance Guide: Issues to consider when developing a policy on disclosure of and voting on matters involving a director's material personal interests.*

Understanding of governance

The board will gain substantial benefit from having a director who has an understanding of governance. It can be of benefit to both the board and the potential director to have completed an education or training program on governance, such as those offered by Governance Institute of Australia and the Australian Institute of Directors. It is helpful to clarify to the new board member the expectation that they will also maintain an ongoing commitment to continual professional development.

Satisfying regulatory requirements

Boards should be aware of the legislative requirements concerning key personnel under the Aged Care Act and obtain written bankruptcy and criminal offence clearances prior to appointment. In addition to ensuring the new board member has not been disqualified by ASIC, entities which have the ACNC as their regulator will also need to have undertaken a search of the ACNC Register of Disqualified Persons and be satisfied that the new board member meets the ACNC's requirements of responsible persons. If the entity is an incorporated association and it is intended that the new board member will hold the position of public officer, they will need to satisfy the requirements contained in the relevant state or territory legislation concerning incorporated associations.

Director induction program

It is important for an organisation to have processes and policies in place which clearly outline the induction processes for newly appointed directors. A well-formed director induction process should provide the newly appointed director with information about the aged care provider, its operations, governance systems and all other details necessary to enable the director to perform their role.

The induction process should also allow for the collection of information about the director as required for their induction and formal appointment. A new board member should be provided with a letter of appointment, which clarifies expectations, for example, expected attendance at board meetings. It also provides an opportunity to seek consent from the director to act in the role if the director has not already provided written consent.

Consideration can also be given to arranging site visits which can provide a new director with a better understanding of the organisation and its operations.

See *Good Governance Guide: Issues to consider when developing director induction processes* and *Good Governance Guide: Director induction packs: content.*

The board induction program may cover:

- the governance documents of the organisation (board charter, committee terms of reference)
- the role of the organisation and its purpose
- the organisation's code of conduct and code of ethics
- recent financial reports
- recent minutes of board meetings
- profile and contact details of all directors
- current strategic plans
- material business risk register
- details of insurances including directors and officers' liability insurance
- recent workplace health and safety report
- recent public statements and media releases
- organisational chart
- individual meetings with key management
- individual meetings with committee chairs and other directors
- site visits to familiarise the director with facilities and operations.

The relationship between board and management

There is no 'one-size-fits-all' approach to the relationship between the board and management of an aged care provider. The amount of interaction between board and management will depend upon the size and complexity of the organisation and will vary greatly from a single facility organisation where the facility manager may report directly to the board and where board members may be familiar with each patient, to a large organisation with multiple facilities and services provided across different locations, where the board may have little interaction with the daily operations involved in the provision of aged care. In a large organisation the manager of the aged care facility may report to a more senior level of management and not have any interaction with the board at all.

Board members are likely to be more 'hands-on' in smaller organisations and volunteer board members may be keen to get involved in the day-to-day decision-making of the provider, particularly if they have family members or friends who are residents. This can give rise to governance issues. Such involvement of board members is a blurring of the differing responsibilities of the board and management. The board has an oversight role, and management is responsible for the day-to-day operations of the business. Moreover, staff and management may not appreciate board members 'looking over their shoulder' — this could damage trust.

It is good governance for an organisation to adopt two documents to provide clarity regarding the delineation of board and management activities: a statement of matters reserved for the board and a delegation of authority policy. A board charter or terms of reference should also accompany these two documents.

The statement of matters reserved for the board identifies those decisions which are to be made by the board and not delegated to management.

See *Good Governance Guide: Statement of matters reserved for the board.*

A delegation of authority policy describes those matters delegated by the board to management, including the specific role these matters are delegated to as well as any limits on that delegation. Authority cascades from the board to the CEO to the executive management team and throughout the organisation.

A board needs to be aware that while it delegates authority to management, it cannot delegate its responsibility.

See *Good Governance Guide: Issues to consider when developing a policy on delegations of authority.*

Setting out a delegation of authority policy is a fundamental component of a risk management framework. It is central to the governance framework of an organisation both at and below board level. It provides a framework for decision-making and accountability within the organisation.

Interaction between the board and management

Good governance requires an appropriate separation between those charged with managing an organisation on a day-to-day basis and those responsible for overseeing its managers. One of the most important roles of the board is to select, appoint and, if necessary, replace the chief executive officer. In many organisations, the board will also approve the appointment, and when necessary replacement, of other senior executives.

It is important for the board of an aged care provider to:

- define the role of the CEO in a job description
- ensure that key performance indicators are in place to measure the performance of the board, chief executive and management
- ensure that regular financial reports are prepared and reviewed by the board
- ensure an adequate internal control framework and risk management system is in place
- ensure that succession plans exist for senior executives within the organisation
- ensure that succession plans are developed for board members.

It can be useful to ensure that the board has contact with the next layer of management, which can be useful in assessing the performance of the organisation. This contact can occur at board meetings or during site visits. The board can also engage with staff and management while conducting 'deep dives' into business units.

Depending on the size of the organisation, there may be an internal auditor as part of the management team. While the internal auditor has a direct reporting line to the CEO or other executive, it is important that the internal auditor has access and a soft reporting line to a board member or board sub-committee to allow for confidential discussions about internal audit and governance matters.

Succession planning

One of the most important functions of a board is to manage succession planning and appointment of the CEO. How a board undertakes succession planning will depend on the size and complexity of the provider. Small organisations, particularly those in rural and regional areas, may struggle to source future leaders internally and may need to search for a CEO outside of the organisation.

The board must consider how best to identify the skills which are required in the CEO. A CEO of an aged care provider needs to have skills in a number of areas such as:

- service delivery
- finance
- workplace health and safety
- procurement
- public relations and communications.

The CEO of an aged care provider is likely to require other skills, which will depend on the circumstances and size of the organisation.

A board will also need a plan in place in the event that the CEO becomes ill, or resigns suddenly. It is sound practice for the board to ensure that another director or manager has the skills to assume the role of interim CEO while the board undertakes a search for a replacement. Succession planning at key management level is also important, for example, at facility manager level to ensure the smooth operation of a facility in the event of the sudden resignation of the facility manager, and for the CFO to ensure smooth operation of the finance function.

Whole-of-organisation governance

Whole-of-organisation governance is about how authority is exercised and controlled below the board in an organisation. Authority cascades from the board to the CEO to the executive management team and throughout the organisation. How an organisation is governed is best not left to chance, but should be actively considered by the board and the executive management team and structured accordingly.

Whole-of-organisation governance is an extension of the governance framework at board level. Key elements in enabling organisations to achieve their objectives are to:

- understand the risks of not achieving the strategic objectives so that these can be managed
- ensure that the effort undertaken by all employees across the organisation is aligned with the strategic objectives
- clarify individuals' roles, authorities and accountabilities in achieving strategic objectives
- empower individuals to make decisions that are aligned with strategic objectives
- clarify the controls and boundaries that apply to the exercise of authority
- provide for clear and effective accountability for the decisions taken and authority exercised.

All decision-makers in the organisation should understand the purpose for which authority is to be exercised — to facilitate the strategic objectives of the organisation (the why). All decision-makers should understand how authority is exercised, who has authority to do what, and what boundaries apply (the how). Appropriate monitoring mechanisms should be in place to provide assurance that decisions are being made in the right way for the right purpose (the safeguard).

A clear whole-of-organisation governance framework supports the achievement of the organisation's strategic objectives by clarifying that decision-making is tied to risk and there is accountability for the exercise of authority. Whole-of-organisation governance is inextricably linked to good risk management.

See Governance Institute's *Guidelines: Whole-of-organisation governance*, which assist organisations and their managers to understand and put in place an approach to putting in place a whole-of-organisation governance framework.

Risk management

Risk is the effect of uncertainy on objectives.[8] Aged care providers are faced with a range of risks that they need to identify and manage in order to achieve strategic objectives. Accordingly, risk management is a critical area of responsibility for the board. In order to discharge their fiduciary duty to act in the best interests of the aged care provider, directors need to know, and properly assess, the nature and magnitude of risks faced by the organisation.

An integrated governance and risk management framework is central both to informed decision-making by the board and adapting to changes in the environment in which the organisation operates. It is good governance for boards to take responsibility for the governance of risk and to delegate to senior management the responsibility to establish a sound system of risk management and internal control, and report regularly to the board on the effectiveness of that system.

See *Good Governance Guide: Risk governance*

The role of the board in risk management

It is the role of the board to set the risk appetite for the aged care provider, to oversee its risk management framework and to satisfy itself that the framework is sound. The board is ultimately responsible for deciding the nature and extent of the risks it is prepared to take to meet objectives. All directors upon induction and thereafter should understand the business of the aged care provider and the material business risks it faces.

Setting the risk appetite explicitly articulates the attitudes to and boundaries of risk that the board expects senior management to take. The board provides a series of licences to senior management to act in particular ways or implement particular decisions that align with these attitudes. Senior management in turn sets in place a further series of licences that cascade the risk appetite through the organisation to align decision-making at all levels with the attitudes to risk set by the board. See *Good Governance Guide: Risk appetite statement*

The board must ensure that the risk management framework covers all aspects of the aged care provider's operations. It is the responsibility of the board to challenge management on the identified risks and the risk weightings given to them.

Governance Institute offers a three-day course *Certificate in Governance and Risk Management* which provides board members with a sound overview of risk management, as well as their role and responsibilities in this area.

The role of management

It is the role of management to design and implement the risk management framework and to ensure that the entity operates within the risk appetite set by the board. Within the risk appetite, framework and process approved by the board, risk has to be managed within the business. It is not managed by the board, the risk committee or the risk management unit (if there is one) but operationally.

ISO 31000:2009 Risk Management — Principles and guidelines and the related handbook, HB 436:2004 Risk management guidelines — Companion to AS/NZS ISO 31000:2009 deal with the implementation aspects of a risk management framework, and will assist management to focus on operational risk management. Governance Institute's publication *Enterprise Risk Management* also provides a framework for approaching the implementation of risk management.

The board of an aged care provider should ensure that management has established mechanisms to:

- monitor exposure and risk management performance — monitoring risk appetite at an organisational level means that there needs to be a clear and defined way to escalate risk monitoring results from all the areas of the organisation
- approve the retention of risks
- enforce the risk tolerances prescribed by the board — an effective risk appetite statement will shape the way the organisation is managed
- routinely monitor and evaluate the risk management processes and report to the board.

Board committees

While the ultimate responsibility for the oversight of risk management lies with the board, in exercising this responsibility, boards often establish committees with a focus on particular aspects. Two areas of focus are common:

- risk oversight and internal control
- integrity of financial reporting.

These are closely related (inaccurate financial reporting is just one risk among many, and many other risks have financial reporting implications), so often a single committee examines both. Nevertheless, it is also common for organisations to have a separate audit committee in addition to one or more risk committees. An audit committee is mandated in Australia for the S&P/ASX top 300 companies and all other listed entities are recommended to establish an audit committee under Principle 4 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*.

8 I S031000:2009:Risk Management — Principle's and Guidelines

An audit committee will have responsibility for the oversight of, and reporting to the board on, the following matters:

- the adequacy of the organisation's corporate reporting processes
- whether the financial statements reflect the understanding of the committee members and provide a true and fair view of the financial position and performance of the organisation
- the appropriateness of the accounting judgments exercised by management in preparing the financial statements
- the appointment or removal of the external auditor and the scope and adequacy of the external audit
- internal audit (if the organisation has an internal audit function)
- compliance.

A risk committee typically:

- provides oversight of activity and advice to the board in relation to current and potential future risks and risk management strategies
- provides recommendations about risk appetite and tolerance
- monitors the management of risk within its remit
- identifies to the board any matters within its remit where it considers that action or improvement is needed and recommends the steps to be taken.

It is for the board to decide whether to have separate audit and risk committees or to combine them. There is no one model that is suitable for all organisations. For some aged care providers, combining the oversight of audit and risk may bring clarity, particularly where the major risks are financial ones. For other organisations, separating the focus could bring greater benefit, with the audit committee concentrating on the financial risks and the risk committee or committees concentrating on other significant business risks. Smaller aged care providers may choose to have the entire board deal with risk issues. If this is the case, it is good governance for the board to deal with risk issues at a separate meeting, with a separate agenda and minutes, to allow a proper focus to be directed to risk matters.

It is also common for the board of an aged care provider to have oversight of the risk aspects of:

- clinical governance (including issues surrounding privacy of personal information)
- ethics
- culture (including provisions for whistleblowing)
- workforce planning
- workplace health and safety
- property, including the sustainability of buildings
- services
- projects
- volunteer management
- IT operations
- insurance
- performance and remuneration
- reputation
- compliance.

It is for the board to decide the number and type of board committees it needs to maintain effective oversight of the risk management framework.

Regardless of the committee structure, there can only be one management process within the organisation and there should be a single integrated view of risks presented to the board.

Board committees may wish to consider presenting a dashboard of key risk indicators at each board meeting, to alert board members to emerging trends in risks which the organisation is facing. Some key indicators a risk dashboard can include are:

- missed services (for aged care providers of home care services)
- complaints and compliments
- medication incidents
- staff turnover
- workplace health and safety, including personal safety of staff
- infection incidents
- volunteer management issues
- vacancy rates
- staff personal leave/ care staff agency usage.

Internal audit and external audit

The board needs to satisfy itself that the risk management framework established by management is operating effectively and as intended. It tests the effectiveness from time to time through assurance providers such as internal and external audit.

An internal audit function brings a systematic, disciplined approach to evaluating and continually improving the effectiveness of the organisation's risk management and internal control processes. The head of that function (if there is an internal audit function) should have a direct reporting line to the board or to the board audit committee (and risk committee or committees if separate) to ensure there is independence of assurance.

Smaller aged care providers may not have an internal audit function, but should be able to demonstrate the processes in place for evaluating and continually improving the effectiveness of their risk management and internal control processes.

Culture

An organisation's culture is the sum of its shared values and behaviours. It includes the values and behaviours of its people as they relate to various dimensions, such as risk, but these dimensions are not separate cultures — they are dimensions of the organisation's culture. Culture is the key determinant in the performance of an organisation and its capability to achieve its objectives. It goes to the heart of the openness and transparency needed for effective stewardship and informed decision-making.

It is the responsibility of the board to define and set the culture of the organisation. It is the responsibility of management to implement the values and behaviours as defined and set by the board as appropriate for the culture of the organisation.

The question for boards is whether the culture is known and understood and whether the actual culture (the lived culture) represents the necessary and desired culture. It is an essential element of governance for a board to understand if there is any disjunction between the desired and stated culture and the actual culture, for it is only the actual culture — the enacted values — that ultimately matter.

The risk culture of an organisation is the shared attitudes (values) and behaviours of individuals about the management of risk in an organisation. The organisation's risk culture will be a key determinant in its ability to respond and adapt to changes in the environment in which the organisation operates.

Compliance

Aged care providers are required to have systems in place to identify and ensure compliance with all relevant legislation, regulatory requirements, professional standards and guidelines. Compliance is a vitally important aspect of operating an aged care facility. Oversight of compliance is the responsibility of the board.

It is important for the board to understand that risk management is not the same as compliance. Compliance processes form part of a risk management framework, as it is the discipline of ensuring that an organisation is acting according to a set of predetermined rules. Non-compliance is a category of risk that can result in loss of reputation, fines and penalties, and business disruption. As one of many risks, compliance risk is part of the larger framework of operational, strategic, financial, market and duty of care risks.

What are the risks faced by aged care providers?

An aged care provider has a number of risks to consider, including:

- strategic risk
- reputation risk
- financial risk
- competition risk
- operational risk
- regulatory risk
- conflicts of interest risk.

This is not an exhaustive list. Some of the key risks that a board has oversight of are set out in more detail below.

Strategic risk

The change in the government funding model for aged care has fundamentally altered the landscape of the sector. Consumer-driven care places funding in the hands of the individual consumer who can choose from whom they obtain their care. Boards of aged care providers need to understand the strategic risk to the sustainability of their operations in the new environment. The role of the board is to develop the strategy for the organisation in light of these changed circumstances.

An organisation's appetite for risk is central to the way it does business. Risk is not just hazards to be avoided but also opportunities to be realised. Risk and its management will be essential to the sustainability of the aged care provider. Members of the board will need to carefully consider the opportunities available to the organisation as a result of the contestability of aged care services. The amount of risk accepted in pursuit of strategic goals will vary widely from business to business, depending on individual circumstances. Important issues for board members to consider are:

- Is the board spending too much time looking at operational risk and not enough time developing strategy? Does the overall strategic planning process consider and prioritise the uncertainty attached to achieving strategic objectives across the organisation? Does management need to be encouraged to incorporate value creation as well as preservation into its risk management framework?

- Boards need to consider emerging trends and issues that could affect their operations. Scenario testing is a valuable exercise for boards to undertake as part of their strategy development. For example, what would the impact be on an aged care provider if another aged care provider established a facility nearby in competition with them?
- The change in funding for aged care services is likely to alter the costs of providing services as competition for consumers increases. Does the aged care provider have sufficient reserves to manage the costs of upgrading facilities to meet the needs of consumers? What are the risks involved in failing to undertake capital improvement? Would this affect reaccreditation? Are financial forecasts being presented to the board and how accurately do they provide for changes in government funding?
- It is easy for organisations to be blindsided by unexpected risks attached to new operations. For example, an aged care provider that decides to enter the market of delivering home care may be fully aware of the risks of operating an aged care facility and have a good risk management framework for that part of its operations. It may not, however, have considered fully the risks involved in the provision of care in the home. The provision of home care services means that employees will be required to enter client's homes to deliver care, which may expose employees to different types of workplace risks.

Reputation risk

A key board responsibility is to consider risks to reputation, and to have oversight of the processes that management implements to protect vulnerable people.

Many aged care residents suffer from physical frailty, illness, and impairment. They are dependent on the provider for their physical and medical needs and, in many cases, their emotional and spiritual wellbeing. Residents who suffer from dementia are often unable to communicate with staff or family members and may be violent towards staff members or other residents. Aged care residents are vulnerable to mistreatment or neglect by staff as they may not be able to communicate their needs to staff or family members. They are also unlikely to be able to protect themselves if staff or other residents physically or verbally abuse them.

Incidents of mistreatment of residents or a failure to meet the regulated standards of care have serious consequences for aged care providers. Sanctions imposed for breach of aged care standards can result in the aged care provider being prevented from taking in new residents, which has immediate financial consequences, or loss of accreditation, which has serious long-term implications. Adverse media coverage of such incidents directly impacts on the reputation of the provider and affects the provider's ability to retain and attract new residents and staff.

The board of an aged care provider needs to satisfy itself that risk management systems are in place to monitor staff, ensure care standards are met and protect residents. It must also ensure that those systems are operating effectively and it has a media policy in place which enables the provider to respond effectively in a crisis situation.

Financial risk

The financial risks which aged care providers face are discussed in the section 'Financial issues'.

Competition risk

The risks of competition which are faced by aged care providers are discussed in the section 'Market-based system'.

Operational risk — Workplace health and safety

The board must satisfy itself that management has put in place a robust workplace health and safety framework. The *Work Health and Safety Act 2011* (WHS Act) has been implemented in seven out of nine jurisdictions (WA and Victoria have declined to be involved in the WHS harmonisation process and have different obligations set out in their legislation). The primary obligation under the WHS Act is placed on persons conducting a business or undertaking to, so far as is reasonably practical, ensure the health and safety of workers. Directors have personal liability under this legislation. Workplace health and safety should be a key priority for the business and the board should ensure that management has created a culture of safety.

The board will seek regular reports from management concerning workplace health and safety, including but not limited to:

- injury to residents — the elderly are particularly susceptible to injury, an increase in the number of falls by residents, for example, or a spike in manual-handling injuries can be an early warning sign of potential problems in workplace health and safety
- employee hours lost due to injury — this too can be an early warning sign that workplace health and safety is not functioning well
- medication management — medication needs to be administered on site and cannot be diverted to another provider. When dealing with acutely unwell individuals, small issues can become amplified rapidly
- hygiene reports — hygiene practices can be tested with bacterial bench testing, if catering is provided in-house and any issue of poor food handling can pose a significant risk of food poisoning that can have serious consequences for the elderly.

Regulatory risk

Aged care is a highly regulated sector. Aged care providers are subject to regulations concerning the amounts they can charge residents and the standards of care they must provide. They are also vulnerable to changes in how government funds aged care places. Changes in government policy can have significant impacts on the ability of aged care operators to make a margin on their provision of services and may even cause some providers to lose their economic viability.

Conflicts of interest risk

Conflicts of interest can arise on any board. Conflicts of interest in themselves are not inherently bad — it is how they are managed that goes to the heart of good governance. It is important that the organisation has a policy in place that ensures that directors disclose any actual or perceived conflicts to enable the organisation to be able to identify and manage them effectively. On appointment a new director should be asked to complete a declaration of interests. This can be attached to the director's consent to act form. The completed declaration should be returned to the secretary (or other relevant person if there is no secretary) who will be responsible for keeping a register of conflicts of interest up-to-date. Declarations of interest should be a standing agenda item at board meetings to ensure that directors have the opportunity to disclose potential or new conflicts.

See *Good Governance Guide: Conflicts of interest in not-for-profit organisations* and *Good Governance Guide: Issues to consider when developing a policy on disclosure of and voting on matters involving a director's material personal interests.*

Conflicts of interest that can arise on the board of an aged care provider include directors:

- who are affiliated with an organisation that provides professional services to the aged care provider — In this instance protocols should be put in place so that they make decisions as a director, rather than a professional services provider
- who are nominated under the terms of the provider's constitution or constituent document by, and often to represent the interests of, an appointer — they can be called representative or nominee directors. They may be appointed to the board to represent a religious group, or appointed by significant stakeholders in a company such as a partner in a joint venture, a significant shareholder, a union or an industry body, or a governmental body or minister. These representative directors often feel a strong loyalty to their nominating body, but must remember that their fiduciary duty as a director is to act in the best interests of the aged care provider and not the organisation that nominated them. Such directors need to consider what expectations such representation brings to the role and what conflicts it could create in terms of their legal responsibilities
- of wholly owned subsidiaries — When an employee of a parent company or other group entity is appointed as a director of one of the parent company's subsidiary entities, they need to understand that they have legal duties and should not regard being appointed to the board of a subsidiary company as an honorary position. Subsidiary company directors must perform their roles in compliance with all of their legal obligations. This requires directors to be active and diligent in performing their roles, and not simply acting as a 'rubber stamp' ratifying the decisions of others. Directors should be mindful that the best interests of the subsidiary company might be different from the best interests of the parent company or corporate group. When making decisions that are in the best interests of the parent company and wider corporate group, directors must satisfy themselves that the decision is also in the best interests of the subsidiary company. The Corporations Act allows a company's constitution to include a provision to assist with subsidiary directors' duties (s 187) and such directors are encouraged to read the subsidiary's constitution to see if this provision has been included or not. See *Guidelines for directors of wholly-owned subsidiary companies.*
- who are representatives or owners of businesses that supply goods and services to the aged care provider — Such directors are not independent and their capacity to bring independent judgment of mind to bear on issues before the board and to act in the best interests of the organisation could be called into question. Furthermore, the board will need to consider whether any dealings between the aged care provider and the supplier are related party transactions, and if so, manage the transactions in accordance with the aged care provider's related party transactions policy. See *Good Governance Guide: Issues to consider when developing a policy for managing related party transactions in not-for-profit organisations* and *Good Governance Guide: Issues to consider when developing a policy for managing related party transactions.*

See *Risk management for directors: A handbook.*

Interacting with stakeholders

As families and consumers are encouraged to be more proactive in preparing for their future needs and are empowered to do so by the government, and as the provision of aged care services is subjected to greater competition, it is increasingly important for aged care providers to engage with their stakeholders. Aged care providers have many stakeholders and the interaction of stakeholder groups presents challenges for those in governing roles.

Aged care providers should:

- recognise the benefits of interacting with key stakeholders
- identify the stakeholders and define their legitimate interests as they relate to the provider and its purpose
- develop an understanding of the role that stakeholders have in or with the organisation, and
- identify the stakeholders' needs.

Interaction with stakeholders should link to the mission of the provider and be part of its strategic plan.

Who are the stakeholders of an aged care provider?

Understanding who the key stakeholders are and the process for establishing their needs will shape the strategy for interaction and engagement. Stakeholders broadly include:

- those who are the focus of the organisation's activities and services
- those directly involved with or responsible for the activity of the organisation
- those who devise, pass and enforce laws and regulations that affect the function of the organisation
- other authorities and bodies that interact, partner or collaborate with the organisation
- those who are the owners, members or have an affiliation with the organisation
- those with an interest in its processes or the outcome of its activities, and
- those who fund or resource their activities.

The stakeholders of an aged care provider will include:

- residents and clients — the residents and clients are the largest and most important stakeholder group. The duty and standard of care owed to them should be embedded in the governance and management of the organisation. The move towards a market-based system with greater accountability and transparency in the way care is provided and fees are charged requires providers to engage more deeply with the users of their services in order to meet their needs
- families — families have a strong and legitimate interest in feeling confident that their loved ones are being well cared for. Usually it is the family member on behalf of the client/resident that makes the ultimate decision of the type of care required and which organisation will deliver the care. It is important for an aged care provider to consider how it will manage communication with families, as this can be time-consuming and carry emotional weight. While the communication is operational, any adverse reaction from families as to how the care of their loved one is being carried out can carry reputational risk for an aged care provider. The board should satisfy itself that it has the right facility managers in place, there is a policy or protocol in place for managing family communication and that it is being followed
- employees — a significant increase in demand for employees in aged care combined with an ageing workforce, limits on remuneration and ongoing training needs makes engagement with employees a priority for providers
- unions — the aged care workforce is heavily unionised and interaction with the unions is an important management responsibility
- unpaid carers — the majority of care for older Australians is provided by unpaid carers. As the demand for aged care services increases, engagement with this group will become even more important for the providers of aged care services, particularly as the move into home care expands
- volunteers — traditionally, volunteers have played an important role in many not-for-profit aged care providers. There is further information on this topic in the section 'Volunteer management'
- regulators — the relationship with a regulator can have a significant impact on an aged care provider's operations. The aged care provider owes statutory

obligations to regulators in the form of compliance with regulations and legal requirements. An aged care provider needs to have a robust system of communicating with the relevant regulators, including a compliance framework to manage the relationship and timeliness of communication. The key regulators include:

  - the Commonwealth Department of Health
  - the Australian Aged Care Quality Agency that assesses standards of care
  - the Aged Care Complaints Scheme that deals with complaints brought against providers
  - the Aged Care Financing Authority that monitors the financial stability of aged care providers
  - state and territory workplace health and safety regulators
  - the ACNC
  - ASIC
  - the Privacy Commissioner

- the Australian Government — the regulatory framework in the aged care sector is driven by the government. Aged care providers need to understand the public policy framework within which they operate and the impact that changes in government policy have on their capacity to provide services and remain economically viable
- the state government — the regulatory framework for retirement villages and for incorporated associations is state-based
- resident representative committees or other bodies — in retirement villages, the residents can form representative committees to represent their interests and provide an important channel for communication between the residents and management
- members — there are different types of members in the aged care sector and organisations have varying degrees of interaction and involvement with them. A large listed aged care provider will have statutory reporting obligations to shareholders. It will have a strong profit motive and a need for strong returns, increasing market share, growth and value. Shareholder engagement needs to go beyond statutory obligations in relation to annual reporting and annual general meetings. It provides an opportunity to ensure shareholders are aware of the company and its performance and prospects; support the plans of the board and executives for its growth and success; are prepared to stay as shareholders to be part of that growth and success; and continue to support the board if and when the company may suffer setbacks in volatile and highly competitive times. At the other end of the spectrum, a not-for-profit provider may have a single member with limited reporting requirements and reserved powers. The member of such an organisation will often be very concerned with upholding and reinforcing the mission and values of the organisation (the altruistic motive) with less focus on value creation. A not-for-profit organisation will need to engage with its member to ensure ongoing support for the purpose of the organisation
- financiers — commercial lenders can often be challenged by the aged care sector in general and, in particular, not-for-profit providers. Financiers will need to be educated about the challenges and opportunities facing the sector
- media — every aged care provider should have a policy on how to deal with the media, including in times of crisis
- the community in which the aged care provider operates — community members can interact with the aged care provider through volunteering, or involvement in fundraising activities for not-for-profit providers, and in regional areas particularly, there will be a high level of community involvement with the aged care provider
- religious bodies — this is relevant where the religious body is the owner of the aged care provider or aligned with it
- intermediaries such as GPs, counsellors, allied health workers and pharmacists — intermediaries need to be included in a stakeholder engagement plan as they often refer and counsel people looking for aged care
- medical community — doctors may visit both hospitals and aged care facilities and an aged care provider will need good relationships with the local medical community to ensure their residents receive the best possible medical treatment. Aged care providers may also have relationships with semi-retired doctors who provide services to facilities. The relationships can have a positive impact on the sustainability of the provider
- suppliers.

Interacting with stakeholders and establishing processes for developing relationships

Once the aged care provider has identified the stakeholders of the organisation, it is good governance to understand the interest held by each stakeholder and then determine an appropriate:

- method of communication, and
- frequency of communication

which can be documented in a communications policy. There are different levels of stakeholder interaction, ranging from active decision-making in facilitating strategic objectives to informing stakeholders of the organisation's activities and undertakings or seeking support for those activities.

The board should ensure that the communications policy:

- is explicitly aligned with the aged care provider's stated purpose and values
- assists the aged care provider to liaise with a range of stakeholders to ensure that a consistent message is communicated in order to reinforce its purpose
- supports its risk management framework
- enhances community confidence in the organisation.

See *Good Governance Guide: Issues to consider when developing a communications policy (NFP organisations)* and *Good Governance Guide: Stewardship (NFP organisations)*.

Volunteer management

The aged care sector has traditionally been one where volunteers have played a large role in fundraising, pastoral care and operations. The *Aged Care Roadmap* recognises the importance of volunteers having a continuing role in aged care. Volunteers are an asset for not-for-profit organisations, particularly as government funding for the aged care sector decreases. There are challenges in managing the involvement of volunteers in the aged care sector and volunteer management will be continue to be an important issue for aged care providers.

Aged care providers who operate with the assistance of volunteers need to have clear policies and guidelines in place for the management of volunteers. These policies will need to deal with issues such as:

- background checks — the checks which volunteers must undergo in order to offer their assistance in an aged care facility are essential. For example, volunteers who have unsupervised access to aged care facilities must undergo a police check and the ACT government requires a 'working with vulnerable people check' of people who volunteer in aged care facilities in that territory
- induction of volunteers — it is good governance to prepare an induction manual for volunteers
- clarification of roles and responsibilities — volunteers are not employees and their role and responsibilities must be clearly delineated
- training and supervision of volunteers — aged care facilities are highly regulated places that care for vulnerable and frail people. Volunteers need to be aware that while they are offering their time in a voluntary capacity, they are still subject to the rules that apply in the facility that safeguard the residents, employees and the aged care provider. Volunteers should be given access to relevant policies and details of their training as part of their induction process. Some organisations may employ a member of staff whose role is to manage and oversee the volunteers who operate in their aged care facility
- insurance coverage of volunteers — volunteers may be covered under the existing insurance scheme or separate cover may need to be purchased. Where the board is comprised of volunteer non-executive directors, the board charter or other relevant document should clarify the extent of D&O liability insurance coverage
- workplace health and safety of volunteers, who are workers under the workplace health and safety legislation (and therefore their safety needs to be ensured)
- recognition of volunteers — a recognition program is a good way to ensure that volunteers continue to feel engaged and that their contribution is valued.

See *Good Governance Guide: Volunteer Management (NFP organisations).*

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