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VITAL LESSONS PRESSING ISSUES

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Conference Magazine

Better Boards Conference 2022

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Welcome Message

better boards conference

Vital Lessons, Pressing Issues… given what individuals, families, communities and organisations have been through since 2020 and are still experiencing, this year's Better Boards Conference title couldn't be any more adept or relevant. Welcome to this year's Conference which sees a dual approach to engagement, electronically and live from Melbourne.

From wherever you are joining us there is no doubt that over recent years boards, chief executive officers and executives of community businesses have adopted new ways and adapted to circumstances, be they at customer, service, organisational or governance levels.

Taking up the first part of this year's Conference theme, **Vital Lessons** allows one time to pause, to reflect and to strengthen one's governance, leadership or management capabilities and knowledge by hearing from other leaders about their journey, insights and learnings over the last few years.

Not forgetting that with so many leaders and their boards, chief executive officers and executives under such significant pressures, such as workforce attraction and retention, funding and finance or government driven industry reform, **Pressing Issues** is the second part of the Conference theme. This year's speakers and presenters will be squarely focused on the hot topics and the practical solutions of today and for tomorrow.

As always this year's Better Boards Conference brings an excellent lineup of pre-eminent speakers and pragmatic presenters, drawn from across Australia.

Bringing these two elements of the Conference theme together certainly sets the scene for another insightful and thought provoking event and as always the opportunity to gain new ideas, build your network and renew past Conference contacts.

So wherever you are from, either nationally or internationally, may I bid you a very warm welcome and I trust this year's Conference really does enable you to have a very enjoyable time and provides you with the time to reflect upon your board's, your organisation's or your own **Vital Lessons, Pressing Issues**.

Yours sincerely,

Michael Goldsworthy
Chairman
Better Boards

Speakers in 2022

YOUR MASTER OF CEREMONIES

Yvonne Adele is an accomplished small business operator and entrepreneur, and one of Australia's leading MC/Speakers, whom you may remember as the fiery redhead on the Today Show as their IT Reporter 'Ms Megabyte', or in the national media. Yvonne will keep us on topic, on task and on time as our MC and will ensure we keep our energy up!

Michael Goldsworthy
Principal Consultant, Australian Strategic Services
Welcome from the Conference Chair

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The End of Democracy as We Know It?

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I.D. Check on Conflicts (and how to manage them)

Randall Pearce ACC
Managing Director, THINK: Insight & Advice
Coaching for Better Board Performance

Jane Porter MCC
Master Certified Coach
Coaching for Better Board Performance

Full speaker bios are available by clicking the speaker's name or presentation title at:
https://conference.betterboards.net/program22

Conference Close

What Are Your Leadership Anchors?

DR RUTH KNIGHT | LEADERSHIP

July 2022

Many people are talking about the Volatile, Uncertain, Complex and Ambiguous (VUCA) world we are living in right now. The pandemic, natural disasters, financial and funding insecurities over the past few years are just a few factors destabilising many people and organisations.

The consequences include significant levels of poor mental health, constant change and overwhelm. Unfortunately stress and overwhelm kills creativity and innovation, which is exactly what we need to counter the effects of a VUCA environment.

So, what should governing boards and other leadership teams do to ensure that individuals and their organisation remains strategic and prosperous? I would like to suggest we need to identify and focus on our leadership anchors. An anchor is described in the dictionary as 'a heavy object used to moor a ship to the sea bottom', something that stops a ship from moving or drifting. When describing a person, an anchor means 'someone that can be relied on for support, stability, or security'. If we use leadership anchors as a metaphor, we are talking about leadership approaches, strategies and narratives that help us feel more steady and calm when faced with complex problems or destabilising circumstances.

Anchors do not mean you are tied down indefinitely or unable to be flexible or agile in high winds. A leadership anchor is something that helps you stay stable and develop resistance when required. But just like real anchors, it is wise to have a few anchors and use the one that works best in your context and conditions.

1. Reframe the problem

Thomas Wedell-Wedellsborg, author of the book 'What's Your Problem: To Solve Your Toughest Problems, Change the Problems You Solve', suggests the more important your problem is, the more effort you should invest in getting diverse people and perspectives involved in trying to reframe it. Reframing means to think about the problem or challenge in a different way or understanding why it is a problem. This results in a new or improved understanding of the problem and can often make you feel less overwhelmed or anxious. As a leadership anchor, reframing problems means you will always be seeing if you can find ways to redefine the problem and asking yourself questions like "Is this the right problem to solve?" and "What's stopping us from achieving our goal?".

2. Use systems thinking

Derek Cabrera is an internationally recognized expert in systems thinking and he recommends using systems thinking to solve every day and wicked problems, as this can transform our effectiveness. Systems thinking is an approach that questions and improves people's understanding of a problem by cultivating collective intelligence with those most affected by the problem. It challenges the single-organisation or single-department 'silo' mentality that so often causes frustration, blame and ineffectiveness. As a leadership anchor, systems thinking means curiosity will be a value you demonstrate every day, it will help you look for different perspectives, and value the quality of interactions and relationships within the whole system. You will ask more questions such as "What is it about this problem that we don't understand well enough?".

3. Improve your team's wellpower and resilience

Jim Stengel author of 'GROW: How Ideals Power Growth and Profit at the World's 50 Greatest Companies' suggests that values and organisational culture remain as important as ever in a VUCA world. He states the top performing companies who foster a culture of improving people's lives outperform other organisations. The financial and human costs of toxic stress and burnout can be devastating so if you want to empower and equip your team to manage uncertainty and complexity well, then start by making sure they feel connected, inspired and resilient. A word of caution, just because you work in a nonprofit organisation don't assume you have this culture inherently. Up to 50% of your team may be experiencing

presenteeism, fatigue, or burnout. As a leadership anchor, this means you will ask "How can we support people to be more creative?", "Do we have a culture where improving people's lives, is what gives us purpose?" and "Do we reward wellbeing practices so people have wellpower?".

4. Create a culture of collaboration and trust

In the book 'Managers as Facilitators: A Practical Guide to Getting Work Done in a Changing Workplace' Richard Weaver and John Farrell use the acronym TARGET as a mnemonic for the characteristics of a collaborative culture: truth, accountability, respect, growth, empowerment, and trust. This is an easy way to identify tangible areas in which leaders can help their team act in a more effective way. Importantly, one of the core drivers of trust is empathy, an attribute that even high performing leaders struggle with but increases emotional intelligence and better decision making. Harvard Business Review found that empathetic companies outperform their less empathetic competitors by 20%. Why? Because empathy helps you listen better, be more authentic and trustworthy. If you use this as a leadership anchor, you will be asking questions such as "How can I demonstrate empathy?", "What makes people say that?" and "Do I give people regular feedback to show I'm listening?".

5. Be reflexive

When leaders are reflexive, they recognise that they are influencing others and the culture, and they critically reflect on circumstances and relationships to learn and create an ethical, responsive, and successful organisation. Steven Taylor author of 'You're a Genius: Using Reflective Practice to Master the Craft of Leadership' states that our mind acts like picture frames or window frames that determine what we pay attention to (what is in the frame) and what we don't pay attention to (what is out of the frame). This creates our mental frames— our theories, assumptions, and beliefs about the world, and these in turn influence our actions. Reflective practice has been identified as crucial to leadership and governance as it helps us become aware of our frames, our assumptions and opportunities to expand our frame, or even choose alternative frames. As a leadership anchor, reflection (either individually or in a group) allows you to continuously learn and reassess your strategies then adapt as required. Try using questions such as "For what and to whom are we accountable?" and "How do I influence people and systems to respond well to complex challenges?".

Leadership anchors

I have proposed five key leadership anchors that can help you as a leader withstand the storms and a VUCA environment being experienced at the moment. They are principles and strategies that have been tested and explored by researchers and experts such as Dr Paul Mather, Adjunct Professor at La Trobe Business School who wrote an article titled 'Leadership and governance in a crisis: some reflections on COVID-19'. He believes that leaders and organisations need to shift how they think about the challenges they are facing. He writes that empathy and bounded optimism is critical for effective leaders who are continuously reassessing their strategies during time of crisis and change. This reassessment process requires purposeful and meaningful reflection, and doing this regularly will increase your self-awareness, sense making and strategic decision making.

I encourage you to take time to think about whether the proposed leadership anchors could help you improve your own effectiveness and confidence, and how might you make them part of your governance and leadership teams anchors.

QUT Business School
The Australian Centre for Philanthropy and Nonprofit Studies

QUT's ACPNS is the Conference Academic Partner.

Dr Ruth Knight
Lecturer & Researcher at QUT's ACPNS
Ruth's presentation is on Systems Leadership.

Further reading:

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The Rise of Technology During The Pandemic – A Double Edged Sword

VERA VISEVIC | TECHNOLOGY, A NOT-FOR-PROFIT AND CHARITY PERSPECTIVE *July 2022*

The impacts of COVID-19 are continuing to be felt across all industries and the charity and not-for-profit (NFP) sector is no exception. Sudden lockdowns and disruptions to service delivery forced charities and NFPs to embrace technology as one of the only ways forward.

Prior to COVID directors, chief executive officers and Whilst technology can improve efficiency, foster collaboration, expand opportunities for growth and help organisations better deliver services, it is a double-edged sword. Cybersecurity incidents have soared during the pandemic with charities and NFPs being a prime target. Further, directors' duties have expanded to include matters relating to technology.

COVID-19, technology and cybersecurity

The emergence of the pandemic presented a myriad of challenges, with 95% of NFPs reporting their service delivery had been affected.[1] Operational limitations and fundraising shortages were a few of the challenges faced by charities and NFPs. There has unsurprisingly been a sharp increase in NFPs adopting Information and Communications Technology (**ICT**) since the beginning of the pandemic. In a report released last year, 69% of NFPs reported they have moved, or are in the process of moving, to the cloud, being an increase from 58% in 2020.[2]

The pandemic has exacerbated cyber risks with charities and NFPs presenting a lucrative target for cyber criminals. Funding shortages, stay-at-home measures and the increased use of personal devices caused by the pandemic has meant that charities and NFPs must remain hyper-aware of the cybersecurity risks. The most common form of cyber-attacks on NFPs are phishing and malicious emails. In 2017, NFP organisation Save the Children was scammed almost US$1 million by a hacker posing as an employee, who tricked the organisation into transferring the money to a fraudulent business in Japan.[3] More recently, in January 2021, Oxfam Australia was the victim of a cyber-attack after hackers accessed its database containing names, phone numbers and, in some cases, bank details of its supporters.[4] Cyber-attacks not only have devastating impacts financially, but can also damage the reputation of an organisation. Therefore, it is crucial that boards are aware of the importance of cybersecurity within their organisations.

Why embrace ICT?

Every single charity and NFP organisation is, by its very nature, an innovator.[5] It only exists because it identified a need and formulated a solution to the problem. Therefore, it should come as no surprise that technological innovation is a key ingredient to the recipe of a successful charity or NFP organisation. Throughout the pandemic, organisations were forced to embrace technology to cope with disruptions and adapt to the 'new normal'. It is imperative that charities and NFPs continue to capitalise on the latest technological innovations in a post-pandemic world.

Digitisation of services can allow charities and NFPs to operate more efficiently and cost effectively, helping to find better ways to deliver services. Embracing ICT can enable charities and NFPs to scale their services and extend their reach, bringing greater awareness to their mission. Donors that help fund the activities of charities and NFPs often want to know where and how their money is being invested. Data collection and analysis technology allows organisations to be accountable and transparent. Technology can also streamline reporting and compliance procedures. Maintaining innovative momentum through ICT is crucial for organisations to fuel growth and remain competitive.

Directors' Duties

Whilst embracing innovation and ICT undoubtably brings opportunity, it is imperative that directors consider the legal implications that follow this digital transformation. Where

technology is an integral part of an organisation, directors' duties have expanded to include matters relating to ICT. Most relevantly, a director's duty to exercise powers with due care and diligence now extends to the use of ICT where poor oversight of such projects can lead to a breach of this duty. It is crucial for boards to understand this duty in the context of a digitalised post-pandemic world in order to avoid potential civil and criminal liability for breaches.

When determining whether there is a breach of the duty of care and diligence, courts will consider what a 'reasonable person' would do if they were in the position of a director in the organisation. For example, courts may consider the fact that charities and NFPs may have fewer resources to allocate towards cybersecurity, however, this does not mean that directors of such organisations are absolved of liability. The duty of reasonable care and diligence may be raised if a director declares having a particular skill, such as ICT expertise.[6] However, in *Australian Securities and Investment Commission v Rich* (2002) 44 ACSR 341, the duty of reasonable care and diligence could not be lowered by a general lack of experience or skills. In the context of cybersecurity, if a director fails to establish adequate data protection measures to protect the organisation, there may be exposure to breaching this duty.

Bringing ICT to the boardroom

Digital leadership emanates from the top. It is important that boards regularly review and elevate innovation on the boardroom agenda. Building a digitally smart board does not require every director to be an ICT expert. However, it is important that there be a degree of digital literacy on the board to capitalise on ICT opportunities and assess ICT related risks. Bringing ICT to the boardroom may be achieved through upskilling existing directors so that they are digitally conversant, recruiting a board member with expertise in ICT, forming an ICT board committee or obtaining external ICT advice.

Budgets are often a primary concern for charities and NFPs and there can be reluctance to allocate funds to cybersecurity. As discussed, charities and NFPs are often targets for cybercrime and implementing appropriate ICT systems and governance structures to mitigate cyber risks can be imperative for the survival of the organisation.

Now more than ever, boards need to ensure they have a proper ICT governance framework that governs how ICT can be used effectively to achieve organisational goals. A framework enables boards to understand ICT use within the organisation as well as providing some confidence to stakeholders. Proper governance allows charities and NFPs to mitigate cybersecurity risks and avoid inadvertent failure to comply with legal responsibilities. Amongst other things, boards must consider whether an ICT governance framework is visible within the organisation and whether there is effective communication with directors and stakeholders regarding the effectiveness of ICT in supporting and sustaining organisational objectives.

Key takeaways

- The pandemic has taught us that boards must have a willingness to embrace technology and invest in innovation to stimulate growth.
- As technology is an integral part of an organisation, directors' duties have been expanded to include matters related to ICT.
- Boards must ensure there is some degree of digital literacy on the board.
- A proper governance framework for ICT helps directors to understand ICT use in the organisation, provide confidence to stakeholders and mitigate ICT related risk.
- The success of technology in charities and NFPs depends upon the ability of directors to both embrace innovation and ensure proper governance.

Vera Visevic
Partner, Mills Oakley
Vera is presenting a session on the legal implications of embracing technology.

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3. Todd Wallack, 'Hackers fooled Save the Children into sending $1 million to a phony account', *The Boston Globe* (online, 12 December 2018) <https://www.bostonglobe.com/business/2018/12/12/hackers-fooled-save-children-into-sending-million-phony-account/KPnRi8xIbPGuhGZaFmlhRP/story.html>.
4. Melissa Iaria, 'Hackers access personal details of Oxfam Australia charity supporters', *The Australian* (online, 3 March 2021) <https://www.theaustralian.com.au/breaking-news/hackers-access-personal-details-of-oxfam-australia-charity-supporters/news-story/577f658603500ac41086970649b13d8c>.
5. Gary Johns, 'Innovative by Nature, Charities Adapt in Challenging Times', *Australian Charities and Not-for-profits Commission* (Commissioner's Column, 1 March 2021) <https://www.acnc.gov.au/media/news/innovative-nature-charities-adapt-challenging-times>.
6. Nicholas Tate and Alexandra Tate, *A Director's Guide to Governing Information Technology and Cybersecurity* (Australian Institute of Directors, 2016).

Improving Governance and Transparency

DR GARY JOHNS | GOOD GOVERNANCE

June 2022

Good governance is vital for transparency and ongoing public support for the charity and Not-for-profit sector. It is important that boards are aware of recent regulatory changes and ACNC innovations that will bolster governance and transparency.

Our latest official data shows Australians donated $12.7 billion to charities in the 2020 reporting period, up from $11.8 billion in the previous period. Transparency and accountability underpin that strong level of trust and confidence.

Enhanced transparency on the Charity Register

The ACNC strives to support charities and we are always looking for new ways to promote transparency in the broader sector.

There is growing awareness that the Charity Register[1] is an important, trusted, official data source. Last year it was searched close to five million times. We recently transformed the Register, making it a more effective way to communicate an organisation's good governance and good work, and for supporters to undertake due diligence.

It now contains the details of about 80,000 programs, and new search features allow anyone to look up the kind of program they would like to support anywhere in Australia. There are hundreds of categories – everything from arts and culture to zoos and wildlife. Search results can be refined by specifying a location; a town, suburb or region.

Each charity decides how best to describe its programs and beneficiaries. Program data appears on its Register record, along with standard details that verify a charity is real and accountable, such as its ABN, the names of its leaders and whether its ACNC reporting is up to date. As program details change, data can be updated.

Strategically, it is important for organisations to scan the environment, to understand where their organisation fits and identify whether others are doing similar or complementary work. They may wish to differentiate their organisation or explore how collaboration could deliver efficiencies or better outcomes. New sector entrants can reach out for advice from established organisations.

Boards and those responsible for running charities should consider the new opportunities that arise from this innovation, to promote their organisation, collaborate with others and be more fully transparent.

There is more information about the enhanced Register here.[2]

Transparency on remuneration

Charities are not-for-profits that particularly rely on public trust and, by law, must meet a high standard of transparency and accountability. They must consider measures to ensure they are accountable and transparent in board members' remuneration, and inform donors, volunteers and the wider public about the decision to do so. People want to know how the sector spends funds.

Under amended regulations passed late last year, thousands of charities, mostly large, are required to report remuneration that they provide to key management personnel — senior decision makers responsible for planning, directing and controlling operations. This includes members of the board or committee and trustees, as well as senior staff such the CEOs or chief financial officers.

Remuneration can encompass financial items – wages, salaries and bonuses – and non-financial items like free or subsidised goods and services. For example, use of a car.

New key management personnel remuneration reporting requirement apply when submitting the 2022 Annual Information Statement to the ACNC. All large charities (revenue of $3 million or more) must report. Medium charities (revenue of $500,000 - $2,999,999) which prepare General Purpose Financial Statements must also report, while for those that prepare Special Purpose Financial Statements it is optional. Small charities (revenue below $500,000) are exempt.

There is more information in our guide on the key management personnel remuneration reporting changes.[3]

Transparency on related party transactions

Under the same amended regulations, there are new requirements to disclose related party transactions. A related party transaction is a transfer of resources, services, or obligations between related parties. It does not have to be financial payment, and can include things like goods, services or property.

Such transactions are common. They are not necessarily a problem, and indeed can bring benefits. But they can give rise to conflicts of interest and the risk that they may not be in the best interests of an organisation.

All charities, except Basic Religious Charities, will be required to report related party transactions in the 2023 Annual Information Statement. For many though, they will need to keep records from 1 July 2022. Medium and large charities also need to disclose these transactions in financial reports. This guide has more detail.[4]

While each of these changes apply to charities, it is in the interests of all NFPs to be transparent about remuneration and have rigorous processes to manage related party transactions.

New online Governing Charities program to improve leadership and transparency

Boards and other leaders of NFPs must be aware of their obligations, take their responsibilities seriously and be proactively engaged in oversight of their organisation. Board members are not mere figureheads. Being ultimately responsible for managing an organisation's finances, operations, staff and volunteers, it is critical that boards ensure they have the right skills and knowledge to execute their roles.

NFPs must align their work with their stated purpose. As a NFP evolves, its activities can change. A good board, however, will manage this. The board will ensure a NFPs activities stay true to its stated purpose, or will amend its governing document to ensure any new activities are in line with its purpose.

Additionally, board oversight is critical when a charity or NFP is involved in advocacy. A registered charity is free to advocate as long as the advocacy helps achieve its charitable purpose —the reason it operates and is granted charitable status (and access to relevant tax concessions). However, a charity's advocacy cannot cross the line and promote or oppose a political party or electoral candidate. This is deemed a disqualifying purpose, and we pursue compliance action if a purpose is not charitable. Of equal concern are the risks to reputation if advocacy is out of sync with its values or purpose.

This illustrates the high level of complexity and responsibility involved in being an NFP Board member. We have just launched a new, free online Governing Charities program, which will be immensely useful for NFP boards. The new e-learning program will benefit anyone seeking to improve their leadership and governance of an Australian NFP. It is a highly valuable resource for new board members, covering the foundations of how to run an NFP successfully. Board members with more experience will benefit from consolidating their knowledge and skills.

This illustrates the high level of complexity and responsibility involved in being an NFP Board member.

The e-learning program will allow board members to acquire the relevant knowledge and skills to undertake their roles effectively. This knowledge will support their organisation to stay true to its purpose and its mission, even as it grows.

Links to the e-learning governance program can be found on the ACNC website. We believe it will fill an important training gap and prove to be a valuable resource for charity and NFP boards.

The Hon Dr Gary Johns
Australian Charities and Not-for-Profits Commissioner
Gary will present on ACNC Innovations to support board governance.

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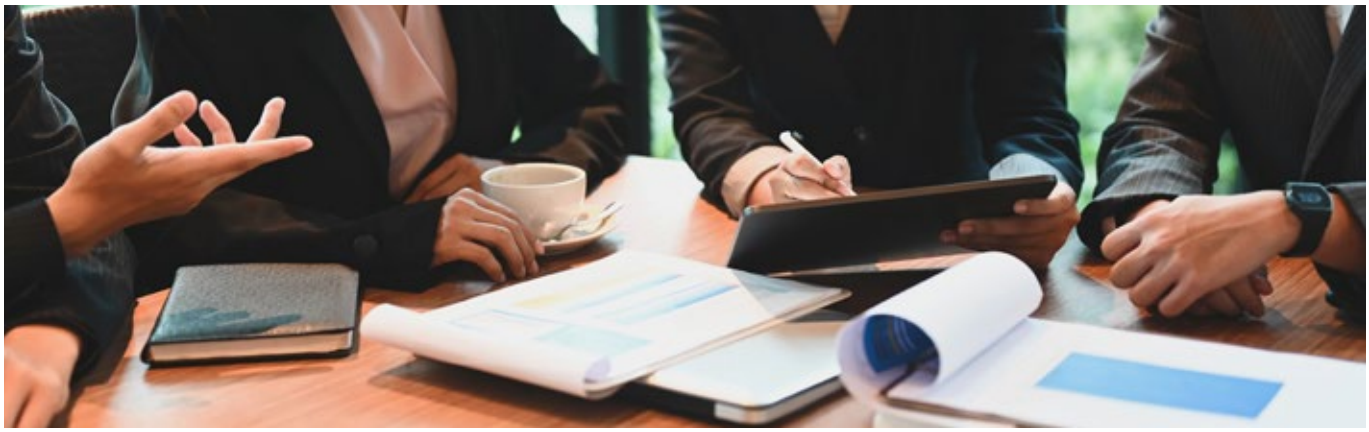
3. https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc/reporting-annually-acnc/key-management-personnel-remuneration
4. https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc/reporting-annually-acnc/related-party-transactions
5. http://www.acnc.gov.au/

In Service of Two Masters – Conflicts in the Context of Multiple Directorships

ELIZABETH LATHLEAN | CONFLICTS OF INTEREST

June 2022



Director recruitment is an important task for both not-for-profit and for-profit organisations alike. It is an opportunity to enhance the skills, experience and diversity of the existing board and ensure the directors are best placed to serve the organisation into the future.

But what happens when the preferred candidate already sits on multiple boards, including the board of a potential competitor?

It is a well-known principle of corporate governance that a director owes certain duties to the organisation they serve. For those individuals who have the privilege of holding multiple directorships, these statutory and common law duties are owed equally to each organisation.

An individual should not be precluded from joining a board simply due to their holding of other directorships. Multiple directorships alone are insufficient to constitute a breach of director duties and often an individual will be able to fulfil their duties to each organisation without issue. However, there are times when the duties a person owes to each organisation may conflict.

What duties are owed?

The nature of the directors' duties owed varies slightly depending on the type of organisation. For the purposes of this article, the directors' duties outlined are those which apply to organisations registered as charities with the Australian Charities and Not-for-profits Commission (**ACNC**). In the case of other types of not-for-profits, there may be variations to these duties based on the relevant applicable legislation (and case law).

Under ACNC Governance Standard 5[1] registered charities must take reasonable steps to ensure its directors meet certain duties. These are the duty to:

- act with reasonable care and diligence;
- act honestly in the best interests of the charity and in furtherance of its purposes;
- not misuse the position of director;
- not misuse information obtained in performing duties;
- disclose any perceived or actual material conflicts of interest (including any related party transactions);
- ensure the charity's financial affairs are managed in a responsible manner; and
- not allow the charity to operate while insolvent.

In the case of multiple directorships, situations may arise where the duties a director owes to one organisation conflict with those owed to another organisation. This is often referred to as a conflict of loyalty or a conflict of duties.[2]

Conflict of duties

Generally speaking, directors have a duty to be aware of and manage (and in some cases avoid) two kinds of conflicts:

- conflicts between their duty of loyalty to the organisation and a personal interest; and
- conflicts arising due to different loyalties i.e., between their duty of loyalty to the organisation and a duty to another party or individual (including another organisation of which they are a director).

As the holding of multiple directorships is not of itself impermissible, it is not the mere existence of a conflict of interest which attracts liability. Instead, the director's conduct must be improper to constitute a breach of their duties. This means there is nothing on its face to prevent an individual director holding a position of director with another organisation or organisations. In fact, multiple directorships have the opportunity to bring a richness of depth and experience to not-for-profit organisations.

The courts have adopted a practical approach to such situations for directors, requiring an objective test as to whether there is "a real sensible possibility of conflict". The duty to manage (and in some cases avoid) conflicts requires a degree of vigilance, as in some circumstances it cannot just proscribe certain actions but positively compel certain courses of action.

A conflict will most commonly arise in circumstances where there are direct dealings between the two organisations. This may include:

- being a director of two organisations involved in designing and/or negotiating a transaction;
- being a director of two organisations pursuing the same commercial opportunity or looking to engage with the same third party (e.g., Government funding); and
- being a director of two organisations pursuing the same market or strategic opportunity.

For example, a director sits on the board of both Charity A and Charity B. Charity A agrees to sell an asset to Charity B. In these circumstances the duty to act honestly can require that director to disclose information to Charity B concerning Charity A's assets, which may be material to Charity B's decision about whether to acquire those assets. In such a case, Australian law suggests disclosure of the nature of the interest to Charity B may suffice, without the need to disclose confidential particulars of Charity A's assets. However, this is often the minimum requirement and the extent of the disclosure (and other actions) required will vary depending on the nature of the conflict.

Practical considerations

The actions an individual might need to take to manage or avoid a conflict will usually become more onerous depending on how serious the potential conflict may be. Practical actions, rated from least drastic to most, include:

- disclosing the conflict to the directors;
- not exercising their powers for the benefit of one organisation without the consent of the other organisation;
- abstaining from taking part in negotiations or voting;
- seeking a leave of absence; and
- resigning from the position with one or both organisations.

What action, above and beyond mere disclosure, the individual must take will vary from case to case depending on matters such as the degree to which the individual has been involved in the transaction and the gravity of possible outcomes for one or another of the organisations. In some cases, it may be enough for the individual (in their role as director) to refrain from voting or absent themself from the board's deliberations on the matter. In other cases, circumstances may require the individual to take some positive action to limit any possible harm to the organisation.

Where a situation can cause an organisation serious harm or where the individual knows entry into the transaction is illegal the individual may need to resign from office as a director to avoid a breach of duties.

Each individual must also assess their own ability to continue to fulfil their duties, particularly in circumstances where managing conflicts results in an individual being absent from multiple directors' meetings or from important decision-making processes within meetings. For example, if the board's time is dominated by a particular matter over a prolonged period (such as entering a transaction), and a director is either on the board of the counterparty or a board of another organisation also bidding for or participating in the transaction process, it may be worth a conflicted director seeking a leave of absence until the transaction is complete or even resigning from the board altogether.

Ultimately, directors of multiple organisations should be alert to the potential for conflicts of duties to arise and ensure any actual or potential conflict is managed appropriately. Board's themselves should also be aware of such conflicts and ensure they have adequate policies and procedures in place to confidently manage conflicts when they arise.

Elizabeth Lathlean
Senior Lawyer, Gilbert + Tobin

Elizabeth is presenting a session on how to manage conflicts of interest.

References:

1. Given the relatively recent enactment of the ACNC Regulation, the courts have not yet had an opportunity to consider the application of the Governance Standards. Any case law references in this article are therefore to cases that have considered similar duties under other legislation (generally the Corporations Act 2001 (Cth)). Whilst the court's application of the ACNC Governance Standards is likely to follow this existing case law, this obviously remains to be seen.
2. Whilst outside the scope of this article, similar conflicts may arise in the context of a group company structure where individuals sit on both parent and subsidiary boards, as well as for employees (particularly senior employees) who hold directorships in other organisations.

Cyber Security 1.0.1 for Boards

RINSKE GEERLINGS | TECHNOLOGY

July 2022

The traditional concept of IT Disaster Recovery (DR), i.e. the solution where an organisation sets up an alternate site where servers, applications and data can be used in case the primary data centre burns down, floods, loses power or otherwise fails, needs to be re-thought completely due to two major developments.

The first one is *Cloud computing*, resulting in the IT DR responsibility seemingly being transferred to the shoulders of an external supplier. "We've outsourced our business continuity challenges to a Cloud vendor" is a popular comment. Don't be fooled though. Like with perhaps everything in life, any benefits usually come with a set of new challenges.

"We've outsourced our business continuity challenges to a Cloud vendor" is a popular comment. Don't be fooled though. Like with perhaps everything in life, any benefits usually come with a set of new challenges.

Whilst you may have picked a Cloud partner with ISO 27001 and/or related certifications, you will unlikely have full control over their operating procedures, any changes in security practices between audits, their mergers and acquisitions, their staff background checking processes, any temporary skill gaps, any disgruntled employees they may have, exactly where on their systems your data resides, and who else's data resides on it.

Additionally, many customers of Cloud vendors have 'all eggs in one basket' when it comes to storing their various data environments (e.g. production, test, development and DR) all with the same Cloud vendor. This is not always the best choice, if we consider the risk of your account being compromised or in case that supplier's systems/ infrastructure go out of operation – which happens even to the best of them, as was demonstrated in 2021 when a leading customer management vendor went down for 6-8 hours taking their clients with them. Clients who often had stopped even worrying about having a Business Continuity Plan (BCP) including manual work-arounds, because *"they had outsourced their BCP to the Cloud"* – remember?

Without negating the upsides of Cloud solutions for BCP, one should just be conscious of the aforementioned issues as well as further downsides, such the relatively little ability to customise the user interface (compared to in-house software). But possibly the biggest downside is the complete and utter reliance on network connectivity. Whilst in a pre-Cloud world, your staff may have been able to continue working on local file and mail servers, now they are no longer able to even email the colleague sitting next to them if Internet connectivity is affected. Cloud can absolutely be an excellent choice, only as long as the decision is made with all pros and cons in mind.

The next development that has changed the concept of IT DR entirely is the uprise in information (including cyber) security threats. The traditional 'primary site vs 'backup site' concept makes little sense if malware has worked its way into both environments. Further complicating this risk is not knowing how far it's travelled, *"so let's initially unplug all systems so we can investigate"*. A fire, flood

or power outage makes itself heard and seen in an obvious way, but with information security threats, part of the challenge comes with the inability to assess properly what's happened, what components are affected, how to remove the cause and when a patch may become available. Finding an expert cyber security consultancy partner quickly to assist in this process may also be a challenge, particularly in the case of a large-scale cyber attack, where it is likely you will not be the only one seeking their help.

In a nutshell, DR is not as predictable as in the past so having a solid BCP with initial/manual work-arounds and excellent communication procedures and tools is imperative – more so than in the past. However, BCPs and Cyber Incident Response Plans (CIRPs) often exist on paper, rather than actually being embedded across the organisation.

There's too much focus on ticking boxes to please auditors or clients, too much paperwork, too much required effort to maintain such plans, too little hands-on implementation, too little buy-in, too little enthusiasm from staff, too little actual incident readiness, and too little effort put into preparing staff to think 'on their feet' when a disruptive incident occurs.

It affects entire organisations. Senior management ends up with false sense of security that everything is covered with technical controls, that risks are managed well, and that staff are ready to act if a cyber-attack or other incident were to occur – and that is if management even understands that the broader workforce must play a part in identifying and reducing information security risks. Whilst, in reality, only a few individuals, such as the BCP manager, the Chief Information Security Officer (CISO) and any IT (Security) staff keep themselves familiarised with the content of the plans and procedures, or even worse, they are the *only* staff who even know these plans exist.

Even if organisation-wide awareness campaigns are occurring, non IT/Security/BCP staff are usually getting on with their normal business without understanding the context and how their daily work might incur risk.

Even if organisation-wide awareness campaigns are occurring, non IT/Security/BCP staff are usually getting on with their normal business without understanding the context and how their daily work might incur risk. Until an immediate trigger occurs (e.g. a real-life cyber incident blocking their data, network or application access), they don't even think about all the issues that could affect them. Often, information (including cyber) security and business recovery procedures only get written or refreshed for audit or other compliance related purposes. And if staff can avoid being involved, they usually will.

The problem actually starts much earlier than that. BCP managers, CISOs and IT Security staff tend to work in a solitary way, or mainly involve those in an organisation who work directly with them. At best, they may try to have some dialogue with senior management to provide confidence that the risks are managed and ensure the top can go to sleep at night.

It is often challenging to get buy-in, time and attention from middle management and the general workforce who are busy 'doing their job'. And that's where the ball stops rolling in many BCP and Cyber Incident Response Planning (CIRP) initiatives.

The result is that mountains of documentation may get produced (including detailed preventative and impact-reducing controls for a range of incidents such as ransomware, DDoS attacks, malware, phishing and social engineering), but these are either written very much generically, e.g. using a standard template 'downloaded off the Internet'.

More 'fit for purpose' style documents (including practical manual work-arounds) are preferred, but these is often invested in just *once* and then easily get out of date. If a real incident occurs, most staff are oblivious to the incident (or confused), thereby increasing the chance of worsening the impacts. They don't know their role, what to look out for, what treatment options to activate and/or who has the authority to give them instructions. In a nutshell, they're far from ready.

These problems stem from the following six mistakes...

1. Only the BCP manager, CISO, IT and/or IT Security staff are fully aware of the plans and these individuals become 'single points of success' without the broader workforce being ready at any time for an incident. Little or no integration exists with broader incident management processes. Or worse, the entire plans have been written by an external party who haven't aligned it with the organisation's processes, structure, priorities and culture.

2. In addition to over-dependency on a few internal skilled individuals, there tend to be an over-reliance on (and over-confidence in) external recovery services providers and Cyber Incident Response (CIR) providers. Will their contractual promises and Service Level Agreements (SLAs) survive a substantial influx in demand for their services if many of their clients are affected by the same incident, such as an industry-wide ransomware attack or wide-spread flooding?

Continued on page 16...

Continued from page 15.

Have you discussed with them how they might juggle their various clients' needs for help and where you are on their priority list? Taking legal action to address their non-compliance and getting compensated weeks

Have you discussed with them how they might juggle their various clients' needs for help and where you are on their priority list?

or months after the event won't help you to maintain proper service levels and relationships with your own clients - and your reputation in the marketplace.

3. Complicated and jargon-filled procedures sent by technical staff to business divisions and expecting their staff to understand and adopt them without proper guidance. Staff within the divisions are often unclear about their role in the plans and the purpose of some of the treatment options (e.g. password change policies, phishing attack simulations, BCP exercises and staff training programs), which results in low uptake, attempts to circumvent certain controls and eventually creates resistance amongst the broader workforce to help keep the process alive.

Top management, whilst aware of the risks and the need to comply with relevant regulatory requirements, often doesn't commit sufficient time to truly understand their own role in the processes, palms it off as an 'IT thing'...

4. Top management, whilst aware of the risks and the need to comply with relevant regulatory requirements, often doesn't commit sufficient time to truly understand their own role in the processes, palms it off as an 'IT thing', isn't equipped with the skills to actively guide middle management and general staff and doesn't commit sufficient resources to embed awareness programmes across the organisation.
5. The CIRP and BCP are built as large documents, which are centrally managed by the BCP manager, the CISO and other Security staff, not regularly maintained and impractical in real incidents, because relevant content is difficult to find. Version control (if any) may be impeded by only one person being able to edit the latest version at a time. And when the IT systems are deactivated as a precaution, the CIRP and BCP documents can't be retrieved as it sits on a system that is now unavailable.
6. Simulation tests being timed inconveniently, repetitive in terms of the scenario, not including sufficient business context/relevance and/or having a 'pass/fail' flavour - causing participants to try to look good in front of bosses rather than trying to find areas of the plan that need improving.

I have observed organisations spending hundreds of thousands of dollars on consultants, only to find they still make these 6 mistakes. The resulting problems recur every few years when the documents are out of date. Or sooner - and this is much worse - when a real-life flood, fire, data breach or other incident occurs and the plan (and other controls) don't work - or nobody knows how to activate them.

Equipped with a short, sharp, dependable BCP and CIRP (integrated where possible, in terms of key decision-makers and related teams), your business will be in a far better position to respond confidently in an actual incident, protecting its brand and reputation, meeting its legal responsibilities, and ensuring the needs of its staff, clients and stakeholders are met. To achieve this, senior management needs to commit to these processes 'all the way'.

The goal is for everyone to be able to sleep soundly at night knowing that, not only are good plans in place, but also that they are up to date, and that everyone knows what to do should an incident occur.

Rinske Geerlings
Managing Director, Business As Usual
Rinske will present a session on cyber security for boards.

The Intersection of Risk, Culture and Crisis and at What Price

CRAIG BADINGS | CRISIS MANAGEMENT

June 2022

Much is said and written about personal, brand and company reputations, but when all is said and done reputation rests on three pillars: context, stakeholders, and culture.

Context because what happens around a business from a government, social, environment and economic perspective dictates the level of risk associated with your operations and your business decisions.

What was right or acceptable 20 years ago may not be right today. What is right according to the letter of the law may not be perceived as right by the society in which you operate.

And, if you aren't engaging with stakeholders, listening to them, tapping into their zeitgeist then you are also incrementally increasing your risks.

What was right or acceptable 20 years ago may not be right today. What is right according to the letter of the law may not be perceived as right by the society in which you operate.

You can have the best reputation management practices in the world but if your culture doesn't align with your values or purpose, you dramatically increase your organisation's risk exposure. Almost every crisis in which I have been involved, and most I've read about, stem from poor culture.

The mark of culture is often defined by the smallest behaviours management is prepared to accept. Get it wrong and you could end up in a crisis which not only costs money but they also scar, if not permanently damage, brand and sometimes personal reputations.

What is the cost of a crisis?

We wanted to find out how much a crisis does cost so we analysed 30 globally listed companies who had suffered a crisis.

The study, Crisis Value Erosion v2, included crises suffered by companies listed on stock exchanges around the world with some experiencing a crisis going as far back as the 1980s.

What we found was:

1. Companies suffered a share price drop between 2.1% to 50.4%.
2. The average days to share price recovery (considering normalised performance across five similar sector stocks) was 147 days
3. Companies suffered; on average an EPS drop of 77%.

The sectors most impacted by share price drops were the mining and minerals, and the entertainment sectors (37.5% and (31%) respectively.

The category of crisis experiencing the biggest impact was environmental damage (with an average share price drop of 35.1%) and crises where human casualties were suffered (an average share price drop of 24.4%).

Those companies with the largest share price impact took the longest time to recover to pre-crisis share prices.

Culture and its role in a crisis

Most of these crises could be attributed to culture.

Specifically, they could be attributed to one or more of the following: an imbalanced focus on shareholder value versus the customer or other stakeholders, poor governance, under-reporting, under-staffing, unrealistic deadlines, poor training and staff development, a lack of accountability and measurement, and management style.

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The mark of culture is defined by the smallest behaviours management is prepared to accept. Misjudgement or mismanagement in this regard can land them in a crisis.

It costs money, and damages reputation equity which, according to studies, accounts for a large portion of an organisation's intangible asset value; a Cap Gemini EY study in 2003 found 80%-85% of market value of S&P 500 comprises intangible value.

While corporate culture is being tested in new ways during the pandemic, a much larger culture test awaits as companies consider the behavioural trade-offs required for a quick recovery and quick returns.

Corporate behaviour and, by implication, culture will be severely challenged and with it looms reputational risks. In the interim, management's challenge is how tightly they manage the behaviours that shape their culture and how closely it aligns with the values and purpose of the organisation now and into the future.

A strong culture is a powerful differentiator, it's difficult for competitors to replicate, it's one of the best magnets for new talent and a great retention strategy for existing employees, and it is ultimately very attractive for suppliers and customers alike.

A strong culture is a powerful differentiator, it's difficult for competitors to replicate, it's one of the best magnets for new talent and a great retention strategy for existing employees, and it is ultimately very attractive for suppliers and customers alike. But businesses need to act now to make sure the culture it creates reinforces and rewards behaviour that begets their best reputation post pandemic.

The companies who get this right will end up with the most powerful risk and reputation shield.

Crisis lessons

Decades of crisis experience has taught us the following:

- Use your values, vision or mission statement to guide your decisions.
- Honesty, transparency and a willingness to communicate quickly should underpin your approach.
- Prepare prior to the crisis i.e. have a crisis plan, make sure you have initiated and approved messaging, have a crisis comms team in place with clear responsibilities, and make sure you have conducted a number of crisis simulations with that team so they know what to do.
- Empathy is critical if the situation requires it – your audience will judge you on how you respond as much as what you say and how you say it. A lack of empathy can quickly see you cast as the villain.
- An apology does not make you legally liable. If you need to apologise do so in a way that does not admit fault, but which shows genuine concern.
- Don't let fear or confusion interfere with your moral compass or cloud your decision making.
- Ensure there is clear leadership for the crisis comms team as well as leadership to run the business. A crisis sucks up an inordinate amount of management time and the execs in charge of the crisis will not have time to run the business.
- Leaders need to be visible – to staff, key stakeholders, and the media if required.
- If it's a cost decision over reputation always go with reputation no matter the cost – you need to be seen to be doing everything possible to make good on the situation otherwise you will be judged harshly.
- Listen to advice from your crisis communication consultants, your lawyers and your team so when you settle on a path you have weighed up all your options.

Finally, when, in the heat of the moment you are deciding, always ask: "In the future, when I am asked when did you know about this and what did you do about it at the time, can I hand on heart say I made the right decision?" If the answer is no, don't do it.

Craig Badings
Partner, SenateSHJ
Craig will present a session on crisis management.

Integrating ESG into Not-For-Profits: Managing Risks and Opportunities

WENDA GUMULYA | RISK MANAGEMENT

July 2022

Environmental, Social and Governance (ESG) strategies and practices have become important aspects for Not-For-Profits (NFPs). The three ESG pillars are not only essential in risk management but have also been seen as emerging considerations for growth and opportunities.

The three pillars of ESG are:

- "E" - the Environmental aspects. This refers to the NFP's environmental impact and environmental stewardship.
- "S" - the Social aspects. This refers to how the NFP manages relationships with, and creates value for, stakeholders - including the interaction with its employees, beneficiaries, and the community.
- "G" - the Governance aspects. This refers to the governance dimension on the NFP's leadership and structure, including the management practices, policies, as well as internal controls.

Many NFPs have helped drive the ESG related causes, acting as both watchdog groups and advocates. Some have benefitted from ESG as recipients of grant funds and sponsorships. Yet, many NFPs have been also slow to embrace the policies and practices of ESG in a holistic manner in their own risk management and reporting.

An environmental NFP, for example, will likely excel in the "E" part of the ESG strategy. But, they may not necessarily implement robust risk management practices and metrics across the social and governance aspects. This may include the measures taken to make sure the operations comply with the wage standard, privacy law, as well as the Anti-Bribery and Corruption guidelines, the use of contractors and vendors from a diversity perspective, and the implementation of internal controls.

Each of the environmental, social and governance spheres has its own distinct risks and opportunities. Once these risks and opportunities have been identified, they can be monitored and addressed to provide solutions for the NFPs challenges, tap the NFPs needs and realise the NFPs potentials.

ESG Risks

ESG risks refer to aspects attributable to environmental, social and governance issues that have an impact on the current and future performance of the NFPs. This includes the relationships and trusts with donors and stakeholders; funding channels and financial performance; compliance status; operations; as well as reputation.

Risk factors to be considered under each ESG pillar are outlined below:

- **Environmental risks:** This may take the form of physical risk, transition risk or liability risk. Physical risk arises from the physical effects of climate change and environmental degradation. Transition risk refers to the uncertainty caused by legislation, policy and societal changes to reduce the impact of climate change. Liability risk is the potential for losses due to litigation because of negative environmental impact caused by the NFPs.
- **Social risks:** The risk factors under this category include work-health-and-safety (WHS); human rights (modern slavery and compliance to the labour law policies); diversity and inclusion; employee wellbeing;

as well as community engagement. Social factors are difficult to quantify, but their significance will intensify in years to come, so it is recommended for NFPs to plan for them.

- **Governance risks:** Like social risks, governance is difficult to quantify, but the reputational impact can be significant. For NFPs, extra attention should be provided to these risks, particularly when there are symptoms of poor codes of conduct, lack of anti-money laundering procedures, or deficient ethical standards across the operations.

ESG Opportunities

With so many new developments and related potential pitfalls surrounding ESG issues, NFPs are understandably focused on minimising the risks. But alongside those risks lie commensurate ESG opportunities, ripe for development for NFPs with a clear understanding of their ESG position.

Because ESG is such a fast-moving developing concept, being mindful of newly emerging priorities, concerns, and expectations among different stakeholders; and how these priorities map back to the purpose of the NFP are important. This will enable the NFP to articulate its ESG policy and place itself in a better position to tap ESG related opportunities.

Opportunity factors that can be considered under each ESG pillar are outlined below:

- **Environmental opportunities:** Environmental opportunities for NFPs mainly points to environmentally friendly practices in the NFP operations, such as: energy saving activities, waste management, water usage efficiency, as well as the reduction of the NFP's carbon footprints. Green funding and green investment are also opening new opportunities for NFPs who are working on the environmental matters.
- **Social opportunities:** Social opportunities for NFPs include the areas of developing human capital, enhancement in work-health-and-safety (WHS), diversity and inclusion, employee wellbeing, and community engagement. NFPs which focus on certain social issues may also want to explore ESG funding channels such as social bond or impact investment.
- **Governance opportunities:** Good governance is a key factor for the success of an NFP because it encourages ethical and effective action across the management and operations. Opportunity factors to be considered include the establishment of code of conduct, compliance with the NFP regulations where it operates, internal controls implementation, as well as the NFP's policies and procedures.

Embedding ESG risks and opportunities into the NFP

Because not every ESG factor will be material to all NFPs, it is essential for each NFP management and stakeholders to be able to identify and manage those that are. That said, what is financially and operationally material will change over time. As such, NFPs are required to understand what ESG matters become material from time to time and to adapt to these changes.

After identifying what ESG factors are material, NFPs can then build the strategy and roadmap for ESG implementation. This usually starts by setting ESG targets and KPIs. In the "what gets measured gets done" fashion, it is important to set the targets and KPIs in a holistic manner, considering key data points and involving all relevant stakeholders. This means the ESG accountability cannot sit only within one team or department in the NFP. For example, the procurement team needs to secure the sourcing of renewable energy, ethical materials, and supplier diversity, where other functions in the NFP need to work on energy reduction, waste management, and inclusive working practice within the operations.

Tracking and reporting on the ESG targets and metrics are also essential to measure the success of ESG embedment. This will help enhance trust with donors and support good governance within the NFP management practice. Many NFPs will likely not be perfect from the get-go when it comes to embedding ESG into the practice and operations. Lessons learned from tracking and reporting on ESG will help the NFP to readjust strategy, targets, and KPIs as processes transform and progress.

It is important to see ESG embedment as a transformational journey. We may start with a simple tweak of a single function, such as substituting fossil fuel energy consumption in one area to renewable energy consumption. But our ambitions can and should be greater. As the ESG transformation moves from a single function to the whole practice of the NFP, we can have bigger impacts on society and the environment; and drive new dimensions of growth.

Wenda Gumulya
Board Chair,
Hoshizora Foundation
Wenda will present a session on strategic risk management.

Strengthening Risk Management at the Board Table

JANE BOAG | RISK MANAGEMENT

June 2022

I see lots of risk registers and risk related documents. Some are great and really help Board members and Executive teams identify, manage and report on the "effect of uncertainty on objectives" (as defined in AS ISO 31000:2018) but many could be strengthened.

Ultimately, risk management is a strategic process – looking forward to explore what may happen in the future that will assist or hinder your organisation in achieving its purpose and goals.

Directors have an oversight function in relation to risk management; ensuring policies, process and systems are in place to identify, manage and report on risk.

Whilst there may be compliance requirements associated with risk management, the true value of risk management is in decision making groups discussing the options, the pros and cons, the level of confidence in a position ahead of time, so that action can be taken to reduce the uncertainty and build organisational resilience.

Here are some common issues and suggested approaches to get the most from your risk management discussions.

#1 – Words are important

Risk registers start with defining the risk, and the risk statement should describe the risk.

I regularly see risks described as "fraud" or "lack of funding" or "change in government policy" but these words don't tell us much. What *about* "fraud', "lack of funding" or "change in government policy" creates uncertainty for us? Do we lack confidence that our ITC systems have functionality to stop collusion, or that we won't be able to run a particular service if we don't attract specific grant funding or that we don't have allocated resources to update our policies and procedures if government policy requires greater focus on staff wellbeing?

The more specific our risk statements, the clearer our pathway to action.

The more specific our risk statements, the clearer our pathway to action. Even if you can't control the risk event (natural disaster, government policy, whether we get a grant or not), the uncertainty is about our ability to respond and limit the negative impact of that uncertainty.

By directors asking questions like, "what creates uncertainty that matters to us?" against each strategic objective, you can create a space for discussion about the specific uncertainty– what exactly is the uncertainty, what's contributing to the uncertainty, and what action, if any, do you need/want to take to give us confidence that the uncertainty is being managed as we expect? This in turn ensures that you're focusing on achieving your goals and addressing barriers to success.

#2 – Risk registers aren't shopping lists

Some of the longest risk registers I've seen have more than 200 risks – they're like a shopping list of everything that could possibly go wrong. These risk registers make it difficult for directors to know what to focus on and tend to be quite operational in focus, where Boards should be taking a more strategic view.

Most organisations find that having 7-10 clearly articulated risk statements that align to strategic objectives and have clear actions and allocated accountability, provide clarity about the significant issues the board needs to be aware

of and monitor closely.

Having a spreadsheet or software tool that allows you to record strategic/enterprise level risks that are the focus of the board separate to the more operational or day-to-day risks under management oversight, makes it easier for to report on risks that require the board's attention.

It means that you can move risks from operational to strategic tabs/sections if risks increase and require greater board visibility. You can also move risks back from strategic to operational accountability or remove completely once the risk is well managed or being controlled as expected.

#3 - Inherent & residual risk are outdated terms

The AS ISO 31000:2018 standard no longer use these terms, so neither should you. I still see plenty of risk registers that include these terms and hear that directors ask for them to be included.

The practice of defining inherent risk (ie the risk before controls/actions are applied) and residual risk (ie the risk after controls/actions have been applied) is a time consuming process that doesn't add to value to decision making.

Contemporary practice is to define the current risk.

#4 – Risk rating is a guide not a fact

Most organisations will have a likelihood & consequence table (often called a 'heat map') that is used to rate the severity of a risk as Low, Medium, High or Extreme. It asks us to consider how likely a risk is to materialise and how great the impact would be if the risk occurred. These tables can be high level or quite nuanced, outlining specific dollar, time or resource limits (tolerances).

The problem is that many decision-making groups spend a lot of time discussing the rating and the template rather than asking if action should be taken or not.

The problem is that many decision-making groups spend a lot of time discussing the rating and the template rather than asking if action should be taken or not.

Likelihood and consequence are not the only factors that will lead us to take action. We also need to consider how quickly a risk might change from being manageable to being a problem. Or your priorities might change in response to changed circumstances or people, thus elevating or lowering the risk rating. Or you may have controls in place but are not comfortable that they are working to address the risk as you expect.

The risk rating is just one factor to consider when looking at how well a risk is being managed.

#5 – Risk management is dynamic

Most compliance/accreditation standards require risk profiles, risk registers and risk appetite statements to be reviewed at least annually, so I often see 'risk' as an agenda item once a year on the Board calendar.

However, your risk/uncertainty will change all the time in response to changes in your environment, so leaving a review of risks to an annual process means you're not getting value from the risk management process and potentially missing opportunities to strengthen your organisational resilience.

One way to move away from compliance focused risk management is to integrate risk into existing processes and practices. For example, having your strategic level risk statements and risk appetite statements attached to Board, Committee &/or Executive papers ensures that they are front of mind. Attaching them to Business Cases or referencing them when noting new opportunities/ issues prompts directors to seek alignment to what we are trying to achieve.

[add] 5 minutes to the end of the agenda to ask – what's changed in the global, national, local environment that might create uncertainty for us?

Having some agreed question sets that give directors confidence or a green light to challenge in the board room is another way to integrate risk thinking into your usual practice. For example, adding 5 minutes to the end of the agenda to ask – what's changed in the global, national, local environment that might create uncertainty for us? What's changed within our organisation that might create uncertainty in other areas of the business or with our partners? That way, if new things are identified, they can be captured and managed early.

We come to the board table as individuals to make collective decisions in the best interest of the organisation. Identifying and managing risk is a critical part of our responsibilities and its worth taking the time to strengthen practices and get value from the process.

Jane Boag
Head of Enterprise Risk Advisory, VMIA
Jane is presenting a session on risk roles and decision-making.

Preventing and De-escalating NFP Dysfunction: The Role of the Chair

DEREK MORTIMER | BOARD DYNAMICS

July 2022

A recurring and often distressed request we hear from NFP chairs and board members is "how to prevent and de-escalate dysfunction".

If only a single answer was big enough to accommodate the range of human values, emotions and agendas one might see expressed by members of an NFP board![1]

In this article I discuss some principles that might assist an NFP chair to help prevent dysfunction within the NFP. I do not pretend to have all the answers.

Relationship between the board and members

It is worth emphasising two general principles;

1. An NFP board has responsibility to manage the NFP, and the NFP's members are not entitled to usurp or exercise those powers; and
2. A board cannot do whatever board members' personal preferences dictate.

A chair that understands and respects those principles might respond effectively to help de-escalate dysfunction.

For example, in a "for profit" case[2] a shareholder group sought to put a motion to the company's AGM. The proposed motion required the company to report on greenhouse gas emissions on projects the company was financing. The shareholders claimed there was a public interest in the company providing such a report.

The Court went so far as to suggest the shareholders' interests were "legitimate interests". However it found that in the absence of an express power, shareholders could not pass such a resolution "as an act of the company."[3] What the company was required to report on was a matter for its board.

One might reflect that a company chair could have avoided the litigation if they adopted language of the Court ie to acknowledge that shareholders had legitimate interests, even if motions representing those interests could not lawfully be put to shareholders.

In another case, an NFP board of a peak body sought to deny membership to a NFP affiliate. In submissions to the Court the board claimed it could "do anything it wished to do, unless expressly prohibited by the constitution".[4] The Court disagreed stating:

> *[The board] was obliged to exercise any power to made decisions about the applicant's affiliation in accordance with the constitution and the [NFP's membership] policy. That is the case regardless of whether the constitution contained any express limitations on the exercise of that power.*[5]

The chair in such a case may have avoided litigation by encouraging the applicant to better put its case, consistent with the peak body's membership policy.

Oppressive conduct

What I am touching on here is oppressive conduct by a chair. As the editor of *Horsley's Guide to Meetings* puts it:

"The Chair must ensure that all persons who are entitled to participate in the meeting are able to do so…"

And where members are prevented from "fully participating" in meetings, then "actual oppression" occurs.[6]

Oppressive conduct provisions are found in NFP legislation[7] and is conduct that is unfairly prejudicial to a member or contrary to the interests of members as a whole.[8]

> *"The Chair must ensure that all persons who are entitled to participate in the meeting are able to do so…"*

Oppressive conduct may be found when a NFP board regularly refuses to admit members who may hold views contrary to the board, seeks out and admits members who share its own views and exercises disciplinary action against members who do not.[9 10]

The litigation described in my previous Better Boards article[11] arose after a church chair exposed a female member for making a complaint against the church's pastor. The chair publicly took the side of the pastor, before an investigation into an alleged breach of a pastor's code of conduct concluded.

Some members successfully obtained orders to appoint an independent chair for the church AGM, an appointment which reportedly, almost entirely de-escalated the conflict.[12]

It should not be assumed that a chair should decide for or against a particular position. Creative solutions might first be discussed.

For example in another faith institution case, the Court ruled that a church committee (and not members) were entitled to control certain property. However, the Court also said: [13]

> *"Any reasonable request by the [particular members], or by any other Church members, to use the … Church property at a time when it is not being used for core church activities, cannot be unreasonably refused".*

One could imagine a chair opening discussion with members about the terms on which church property might be used, when "core activities" are not underway.

Some take home principles to assist a chair

Based on the case law and NFP legislation discussed above, some principles an NFP chair might apply to prevent and deescalate dysfunction are:

- Encourage discussion within the board on issues, and where necessary or appropriate, within the wider NFP's membership
- Remain impartial insofar as not favouring one view over another, but remain aware of time and other administrative obligations
- Acknowledge legitimate interests, even if those interests might not be lawfully met by the NFP
- Put forward creative (rather than defensive) solutions that respect viewpoints of numerically minor factions
- Respect your position as chair and accept that a time will come for you to vacate it, hopefully with your dignity intact.

Derek Mortimer is principal of DF Mortimer & Associates, a Melbourne based law firm that practises exclusively in not for profit law. Derek served for about 10 years as founding Chair of the Law Institute Victoria Charities and not for profit law committee.

Derek Mortimer
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Derek is presenting a session on members and voting.

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Constitutions – The Foundations of Good Governance

KATHY NGUYEN | CONSTITUTIONS

July 2022

Constitutions are crucial documents. At a national level, they describe how a country is governed. In democracies Prime Ministers and Presidents are elected to office following the processes described in a nation's constitution. The Australian parliament states that the "national constitution is a set of rules for governing a country".

Similarly, constitutions lie at the heart of associations and charities and provide their rules. Significantly, they define who the members are and the process by which the organisation is run and elects its leadership. A good constitution is paramount to successful outcomes for a not-for-profit organisation.

Purposes or Objects

The purposes or objects clause describe the legal reason why an organisation exists and influences taxation and charitable status. The organisation's vision, mission, strategic plans and activities should be consistent with the purposes as stated in the constitution. If there is discrepancy between the purposes and what the organisation is doing in practice, which might be deliberate or arising as a consequence of mission drift, either the purposes should be updated or the plans and activities realigned to the purposes. This is particularly important for charities, as they must act in pursuit of their stated charitable purpose to maintain their charity status.

The organisation's vision, mission, strategic plans and activities should be consistent with the purposes as stated in the constitution.

Members

Members are key stakeholders and play a significant role in governance by receiving reports at the AGM. At the heart of their role is electing or removing directors, appointing the auditor and maintaining or changing the constitution. Constitutions need to be clear about who the members are (surprisingly, this is not always the case) and specifically which members have voting rights. This is critical because, if constitutional change is required, it should be clear who has the right to vote on such changes.

Constitutions need to be clear about who the members are (surprisingly, this is not always the case) and specifically which members have voting rights.

Is membership a fundamental requirement of the mission of the organisation? The answer to this question is clearer for some organisations (e.g professional associations or industry associations) which exist for their members' benefit than for others, (e.g health promotion charities or community service providers) that exist for the benefit of the community or society at large.

Though it should go without saying, it is well to remember that boards should review their organisation's membership structures as defined in the constitution to ensure they have the right members and that the voting rights are clear.

General Meetings of Members

General Meetings are formal meetings of the members and are an inherent part of the governance process of not-for-profit organisations. It is often the only real time the members get the opportunity to communicate directly with the organisation's directors or committee members.

General Meetings provide the opportunity for members to vote to change the constitution and also choose the Board of Directors.

General Meetings provide the opportunity for members to vote to change the constitution and also choose the Board of Directors. The Annual General Meeting is the pinnacle of the compliance cycle where the Board of Directors, being accountable to members, must report to the members on specific matters.

While they are an uncontroversial part of the constitution, the importance of General meetings should not be lost on those who draft and interpret constitutions. They are at the core of providing transparency in the running of an organisation. In the case of registered charities at the moment, the holding of an AGM is not mandated. Despite this the AGM appears to be the ACNC's preferred vehicle for charities with members for showing that the obligation to be accountable and to communicate is satisfied.

Constitutions must clearly state the processes regarding a General Meeting, many of which will be guided by the relevant law. Of note is the need for constitutions to clearly state that General Meetings may be held using technology both in hybrid settings and in a fully virtual format.

Boards of Directors

Whether called the Board of Directors, Committee or Council, constitutions need to explain clearly how the governing body is constituted and the process by which the people on it are elected or appointed.

In order to ensure governance structures are fit-for-purpose and aligned to the mission and current culture and practices, not-for-profit boards should review their composition at regular intervals. Reviewing board composition involves looking at the process in which directors are elected or appointed on to the board, including:

- size of the board,
- terms of office and the balance of continuity vs refreshing of the board,
- mix of required skills, experience and perspectives and how to recruit directors accordingly.

Do not conflate a General Meeting with a board meeting

Some of the worst constitutions read by Governology are those that confuse the distinct roles of members with the role of the board. The major flaw in these documents is often that a board meeting is seen as being the same as a General Meeting of members. The role of these distinct meetings, the responsibilities of attendees and the processes are all very different. This is so even where the directors comprise all of the members of the organisation.

Changing your constitution

Constitutions are evolving documents and sensible changes are often required. Therefore, the change process needs to be done carefully otherwise there is an elevated risk of the changes not being accepted by the membership or in some of the worst cases - a member revolt resulting in an erosion of trust in the leadership.

Constitutions are evolving documents and sensible changes are often required.

Our suggestions include:

- getting the right balance between undue haste and unnecessarily long timeframes that sap momentum
- having the right members involved in the process at the right time
- using different styles of documentation at different stages
- respectful and open consultation throughout the change process.

Conclusion

The foundation of good governance relies on the constitution. Poorly drafted constitutions that are outdated, ambiguous or complex can hinder good governance and unnecessarily distract Boards and management. With the right structures and rules of governance in place, a not-for-profit organisation is better placed to achieve its mission.

Kathy Nguyen
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Kathy is presenting a session on constitutions.

Coaches in the Boardroom?

RANDALL PEARCE & JANE PORTER | LEADERSHIP

June 2022

Leading a not-for-profit organisation can be a lonely pursuit but it need not be. Leadership experts say Board chairs, non-executive directors and CEOs all need allies to help them monitor and navigate the shifting dynamics of a volunteer board.

Increasingly, not-for-profit leaders are looking to organisational or executive coaches to be that thinking partner. And, with good reason. Organisational coaching is a practice that has been proven to increase effectiveness of decision-making, sharpen strategic focus, develop, and encourage constructive board leadership behaviours, and help navigate transitions.[1]

Coaching is a strictly confidential practice. Coaches accredited by the International Coaching Federation are bound by a code of ethics[2] which requires strict confidentiality, making professional coaches the ideal confidantes of leaders who need to keep board business confidential. Board chairs, non-executive directors and CEOs can all confide in professional coaches in ways they can't with colleagues outside the board room, no matter how close.

Coaching sets up a more equal partnership than any other found in the board room. 'First among equals' is the phrase often used to describe the role of the chair but the fact that the chair is responsible for how the board operates, inescapably puts them above the rest.[3] No matter how egalitarian, a board chair can't confide in another director, any more than a manager can confide in a subordinate. By contrast, coaches enter a peer-like relationship with their 'counterparts' – the term today's coaches use in place of 'coachees' – where both parties are equally focused on addressing the same leadership challenge.

Non-executive directors, like chairs, are required to bring an 'independent mind' to their deliberations, which makes it difficult for directors to support one another. Ronald Heifetz, the Harvard professor who minted the term 'adaptive leadership', argues that to be effective, a leader needs to seek out partners who can 'go to the balcony' and report back with drone-like perspective on the leader's performance. He describes leadership as simultaneously active and reflective. Heifetz argues that it is the partner's perspective that makes their allyship valuable.[4] By being 'one step removed' coaches can be the partners not-for-profit leaders need.

CEOs can also benefit from organisational coaching. While team members might be close and supportive, the relationship is not equal. The hierarchy of the organisational structure puts the CEO above the rest, disqualifying colleagues as allies. Direct reports also have a clear conflict of interest. While a CEO might have (and should have!) a close and open relationship with her board chair, there are limits there to. As the employer representative, the chair is constrained. By contrast, coaches face no such limits and can work side-by-side with their counterparts to confront challenges and seize opportunities.

The roles played by coaches and their counterparts are executed in an equal partnership, but they are not the same. The counterpart brings to coaching the leadership issue or opportunity he would like to explore, and the coach brings the skill of listening deeply to what is said. The coaching partnership allows new perspectives to be generated, not advice. In the end, the leader decides (with the support of the coach) because only the leader can make the call. Coaches come alongside, teasing out options, evaluating trade-offs and exploring with their counterparts how decisions will be turned into action.

Beyond the well documented benefits of organisational coaching, some are specific to the not-for-profit boardroom. First, coaches can help leaders resolve issues before they become longstanding barriers to progress. Rather than tolerating 'seat warmers and saboteurs', chairs can deal with underperforming or disruptive directors in real-time rather than having to wait for the next AGM to recruit 'fresh talent'.[5] By acting, chairs might also retain other directors who are unable to cope with the disruptive behaviour. Second, coaches can help non-executive directors grow into chairs by helping them to gain better awareness. Third, pairing a coach with a board chair or a CEO, or both, can help the relationship flourish, saving careers, and the high cost of CEO turnover.

Coaching the Board as a Team

There are also benefits from coaching boards as teams. As Lynda Carroll, CEO of HR consultancy the Align Group writes:

> *An effective board works with management to develop an entity's strategy, purpose and culture. It ensures management are clear on how success will be measured, monitors management's delivery and ensures the entity satisfies all its compliance obligations. To fulfill this role, a board needs to work together as a highly effective governance team making high quality decisions.*[6]

A board holds more responsibility and deals with more complexity than any other team, but investment in board team development is well behind that of other teams. As boards exist to deliver on their mission, teaming must sit at the heart of creating better boards.[7]

There is a strong case for developing boards as teams. Twenty-five years of research into high performing teams found that the indicators for board success are almost identical to the indicators for team success.[8]

The common indicators of success are for both teams and boards are:

1) Clarity of purpose

2) Well-developed collaborative decision-making ability

3) Group relational intelligence

4) Attention given to learning and process

5) Leadership and role clarity

Team coaching addresses all five indicators. Some examples of how team coaches can assist with success are; developing shared purpose, learning how to make effective timely decisions and drawing attention to group dynamics that help and hinder board performance. One result of this can be efficient use of time which can help boards function under time pressure. Unconscious group think and bias are also present in every boardroom, coaches can raise awareness of these lurking dangers too.

Coaching the board as a team can help individual directors raise difficult issues in a constructive way. This enables individual thinking to be heard in the context of what is to be achieved together. Team coaches work with teams to develop psychological safety while the team is doing the real work of attending to delivery. One way this is done is by helping a board learn which of their tasks and relational processes are working well and what needs to change. Understanding this can have a positive impact on trust and safety.

Diversity and Inclusion is a hot boardroom topic and research has shown that the potential for conflict increases with greater diversity. A recent Deloitte report highlighted that boardroom diversity is only useful when inclusive teaming boardroom behaviours are developed alongside achieving diversity quotas.[9] A team coach can help develop those critical behaviours.

Whilst the idea of coaching a board as a team is a relatively new concept, it has already been proven to generate some startling results. One recent study showed that improved teamwork in the boardroom was found to be eight times more important to organisational performance than focusing on individual contributions[10]. Ultimately, effective teamwork comes down to the quality of the conversation around the table, which itself is the result of healthy board dynamics. Team coaches can help with both elements resulting in higher levels of trust and efficiency in the boardroom.

Finally, Boards and individual directors are being increasingly called to develop greater self-awareness emotional intelligence, psychologically safe boardrooms, and director resilience[11].Coaching, both individual and team coaching, are proven pathways to building better board performance.

Randall Pearce ACC
Managing Director, THINK: Insight & Advice

Randall and Jane will present a session on coaching in the boardroom.

Jane Porter MCC
Jane Porter and Associates

Jane and Randall will present a session on coaching in the boardroom.

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Strategy The Key Domain of Directors, CEOs and Executives/Senior Managers

MICHAEL GOLDSWORTHY | STRATEGY

July 2021

In this article, Michael Goldsworthy discusses why directors, chief executive officers and executives/senior managers must continue to adopt new approaches to their strategic thinking, strategic discussion and strategic decision making … in essence, the strategic development and growth of their organisation.

Prior to COVID directors, chief executive officers and executives/senior managers were increasingly adopting a more rigorous and focussed approach to;

- the planning, implementation and monitoring of their organisation's strategic transformation strategy
- the analysis of their current business model and determination of their future business model and its alignment to their renewed or new vision, mission, values and core business statements; and
- understanding current and future customer requirements, and the strategic positioning of their organisation as measured against their peers, the marketplace and the industry or sector in which the organisation operates.

For chief executive officers and executives/senior managers the impacts and implications, challenges and risks of COVID means there is now, more than ever, work to do 'in the business'. However the medium to long-term success of organisations and their businesses depends on the directors, chief executive officers and executives/senior managers ability to 'work on the business' and strategically position it for the new normal. The need to adopt a more rigorous and focussed approach is critical in the new normal generated by COVID.

There are six key principles that can support directors, chief executive officers and executives/senior managers in these approaches;

1. Boards Strategise, Directors Are Strategists

Dynamic and proactive boards should, first and foremost, strategise, because individually directors are or should be strategists. In essence, strategy is a way of thinking, not a framework or set of procedural exercises or tools. In fact, traditional strategic planning processes and tools are giving way to scenario planning and therein new, more powerful processes and tools that provide directors with such elements as privileged strategic insights, unique industry or organisational perspectives and defining potential competitive advantage.

Strategic thinking, strategic discussion and strategic decisions are key processes of strategising boards. These processes enable boards and individual directors to understand and appreciate such trends, forces and components as:

- The emerging industry/sector big picture, which is the stage and backdrop upon which the organisation is currently positioned and the likely industry/sector scenarios and their organisation's various strategic options and associated key assumptions, risks and indicative strategies.
- The current 'state of the nation' of their organisation and therein the mission criticals that will need to be addressed to ensure the organisation's future success and sustainability, as well as the various differentiators

from the organisation's peers and the marketplace.

- The agreed future scenario of the organisation, in essence its desired future and the associated strategies and/or projects that will propel the organisation forward.

2. Strategists Don't Just Rely On Voluminous Reports and Presentations

The days of voluminous reports and presentations being provided to directors in preparation for their annual strategic planning workshop, to assist them with coming up to speed with the organisation and/or the industry/sector in which they operate, are over.

Short, sharp strategic reports and presentations should paint a snapshot – a picture that refreshes or complements the directors own industry insights and business intelligence (see number 3 below) or if needed enables directors to quickly come to grips with both the industry/sector and organisational situation as well as the associated issues and/or potential opportunities or solutions.

The personality traits of strategic foresight, insight, creativity, innovative thinking and entrepreneurship are but a few of the human qualities and processes that some directors can provide to a board that is actively pursuing the development of a new strategy or envisioning a new future. All directors should be encouraged to develop and/or strengthen these traits. Whilst not commonly acknowledged, it is worth considering that the personality type of each director is just as important as the skills, knowledge or experience each director brings to the boardroom.

3. Industry Insights & Business Intelligence Assist Boards to Strategise

Understanding the components, dynamics and trends of the industry/sector in which their organisation operates is critical for directors, eg. in the aged care and disability industries understanding the affects of customer choice and control and the creation of competitive marketplaces brought on by Commonwealth and State Government reforms. Up-to-date industry/sector and business intelligence and understandings can provide critical contributions to strategy discussion and formulation, but this relies heavily on individual directors adopting such a mentality and approach.

Tours and visits, industry forums and conferences, joint board dinners and forums, winners' weekends and innovation tours were all activities smart boards were using to get out of the boardroom to inform themselves about the industry/sector their organisation operates within and what other boards and organisations are doing.

While COVID has curtailed many of these activities the move by conference organisers, professional associations and professional service firms to host larger numbers of virtual events ensures directors continue to have a suite of options to gain industry insights and business intelligence. The publication of articles and blogs also remains a valuable source.

4. Recognise The Past, Understand The Present, Create The Future

Creating the future for one's organisation is not just about individual directors being strategists, intuitive, creative and entrepreneurial or putting forward new ideas and opportunities as a board, directors also need to:

- Recognise past events, processes or learnings.
- Understand the present organisational situation, and the mission criticals that the organisation is facing; that is, those things that are fundamental to the future success and sustainability of the organisation.
- Create the desired future of the organisation, a set of descriptors or a picture of the future state of the organisation and the strategies that will propel the organisation forward.

Across Australia many directors are working hard to increase their understanding of both their organisation and the industry/sector in which it operates. If individual directors and/or boards do not acquire this knowledge and keep it up to date they, more often than not, develop flawed organisational strategies or worse still, operational strategies that are in fact not their domain and should not be contained within a strategic plan.

Therefore, it must be recognised by boards that the crafting of powerful, realistic and practical strategies that are founded on recognising the past, understanding the present and creating the future, is typically an art form developed by directors over many years.

5. Leadership Teams, The Collective Strategic Capital Of An Organisation

An increasing number of boards are coming to recognise the real value and benefits of forming and utilising a leadership team – the collective and collegial approach that brings together and harnesses the skills, knowledge and wisdom of the directors, chief executive officer and executives.

These leadership teams focus on both the internal organisational and external industry/strategic challenges and opportunities. They also utilise the organisation's vision, mission, values, core business and philosophy as

Continued on page 32...

Continued from page 31.

a touchstone against which they can confirm or refute their strategic thinking, strategic discussion and strategic decisions.

Typically this approach to leadership and strategising will only be adopted by a more mature, sophisticated boards of directors. In so doing, each individual leader not only recognises their own and others' respective governance or management roles and responsibilities but, most importantly, proactively contribute to this methodology.

6. Talk Is One Thing, Action Is Another

As many a veteran director of the boardroom can attest, 'talk is one thing, action is another'. Whilst focus and discipline in strategising is paramount fulfilling both halves of this mantra is critical if documented strategies are to be properly implemented and monitored.

It is on this basis that an increasing number of boards do not just have a strategic plan, whether an A3 or a full strategic plan, but have also obtained and customised a strategic planning system. In essence, they are utilising a strategic planning framework, process, documents and tools to plan, implement and monitor their strategies to ensure the organisation they govern and lead is both successful and sustainable into the future.

This article has been published on LinkedIn at shorturl.at/fqvxC.

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Michael is the Conference Chair.

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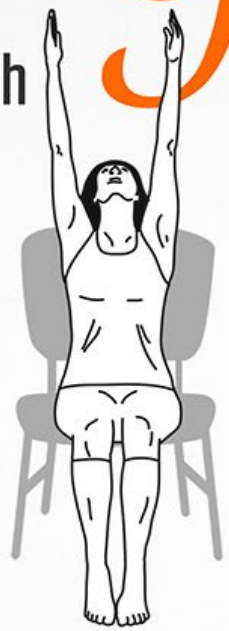

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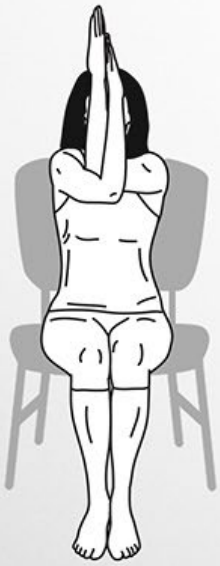

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