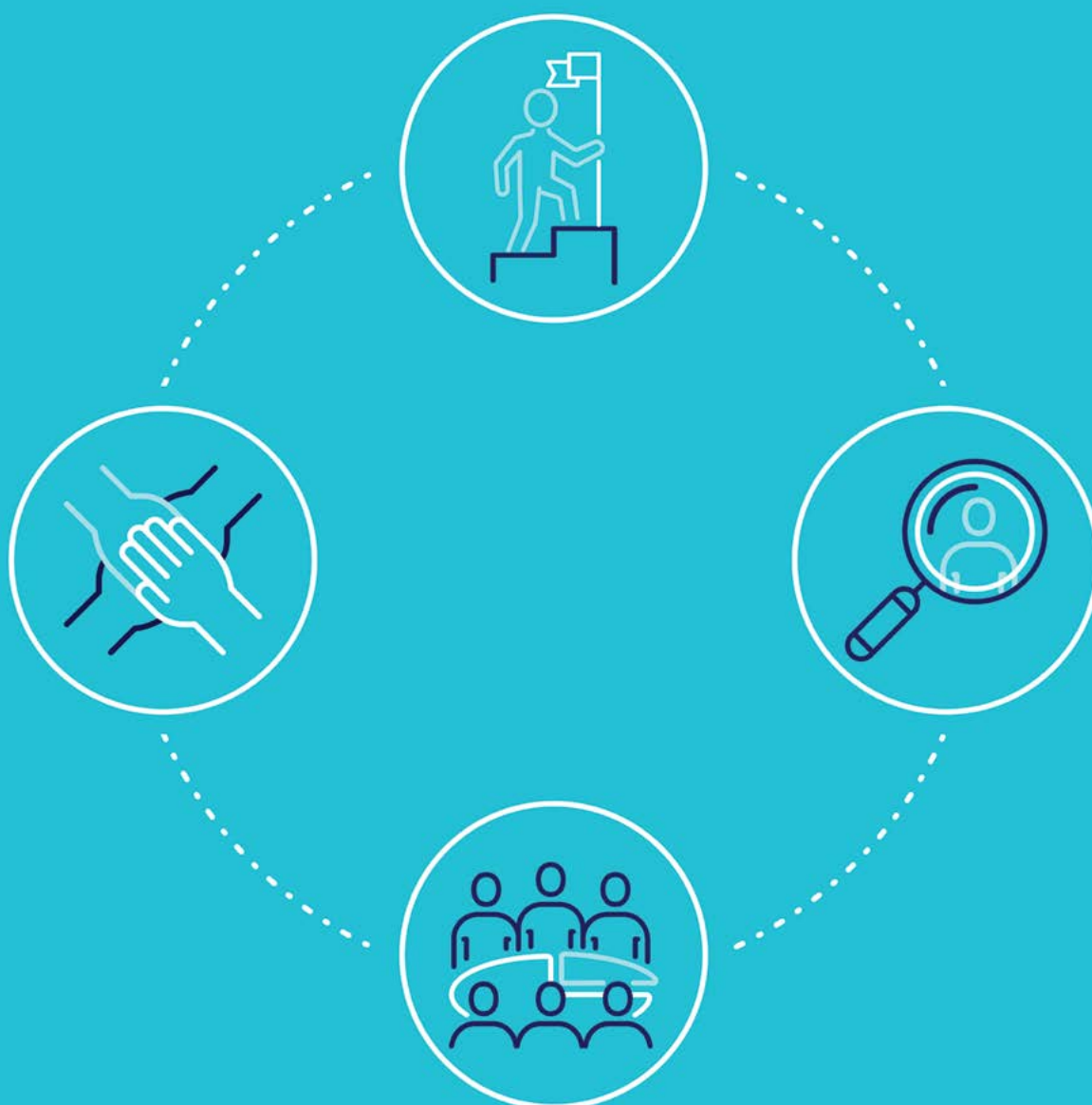


Issued April 2019

Forward Governance Agenda:

Lifting Standards and Practice



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WE'RE FEELING SOCIAL, CARE TO JOIN US?

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Please provide your views on the consultation questions by Friday 17 May using the online version of this paper at:
companydirectors.com.au/advocacy/the-forward-governance-agenda

This Consultation Paper poses questions for member feedback throughout.
Please respond by 17 May 2019 using our interactive online version of the paper at:
companydirectors.com.au/advocacy/the-forward-governance-agenda
Alternatively, send your views to **policy@aicd.com.au** (all questions listed in Appendix).

Introduction

Thank you for contributing to this important member consultation by the AICD.

At the Australian Governance Summit in March, our Chair John Atkin FAICD and I spoke about the AICD's Forward Agenda – our response to the ongoing focus on governance standards and practice.

Our agenda focuses on four themes: standards and professionalism; directors' duties and stakeholders; accountability; and the governance of culture and remuneration.

It is critical that the AICD draws on the experience, perspective and insight of our members – our broad community of more than 43,000 governance leaders – in developing this agenda.

This consultation represents the first stage of testing our key themes with members.

Please share your views on the Forward Agenda by 17 May 2019.

Our agenda draws on the findings of the Financial Royal Services Commission and other Royal Commissions and inquiries – including the APRA Prudential Review of CBA, with its call for boards to inculcate their organisations with a 'Should we?', not 'Can we?', mindset.

Many of the governance observations from these inquiries are already reflected in the AICD's education curriculum but we can do more to support directors in practice.

As the peak body focused on building the capability of Australian directors – the people with ultimate responsibility for the conduct of their organisations – the AICD and our members must lead the changes we need to lift the practice of governance and bolster community trust in our system of governance.

Of course, responding to these challenges does not mean accepting poor policy.

Commissioner Hayne has confirmed the fundamental principles of our governance model, including the 'superintendence' role of the board distinct from day-to-day management, and the framing of directors' duties in the current law.

The AICD is, and will remain, a champion of these principles, strong governance frameworks and the rule of law.

At the same time, we must focus on the changes we all need to support a respected, trusted and capable director community.

Together with you, our members, we need to rebuild the community's trust in the ability of boards to provide stewardship and oversight of their organisations.

Our Forward Agenda sets out the areas where the AICD believes we must do more - in contributing to policy, providing guidance, and promoting high standards of practice.

Your response to the questions in this paper will guide the priorities that the AICD sets to meet these challenges.

This is our starting point, with your support.



Angus Armour FAICD

Managing Director & CEO
Australian Institute of Company Directors



Executive summary

What feedback is the Australian Institute of Company Directors (AICD) seeking?

The AICD is seeking member views on our Forward Agenda – a program of work that aims to respond to current debates on governance practice and standards.

We are inviting member views on the four areas of focus that we have identified, and suggested priorities and actions under each of the four themes. This Consultation Paper does not set out a detailed work plan. Instead, it is seeking our

members' views on the areas of focus we have identified as well as relevant practice considerations.

Your feedback will help the AICD determine priorities and initiatives to take forward. Members are invited to provide feedback on specific questions outlined in this Consultation Paper, as well as general views and comments (see "How can I provide feedback?" on the following page).

What is the AICD's Forward Agenda?

The AICD's Forward Agenda has a focus on four key themes, with six broad actions, set out below.



Standards and professionalism

Action One

We will review and strengthen our Membership Code of Conduct.

Action Two

We will amend our DPD framework to mandate a focus on ethics.

We are asking you:

- What should a new Code include?
- How should we handle breaches?
- Should we mandate a focus on ethics in Director Professional Development?
- Should we require a focus on other areas?



Duties and stakeholders

Action Three

We will lead a conversation on directors' duties to test application of the best interests duty in practice.

We are asking you:

- How do you apply the best interests duty?
- How does your board bring stakeholder voices into governance decisions?
- Should the AICD lead a conversation with legal experts, directors and stakeholders on duties?



Demonstrating accountability

Action Four

We will help boards adapt to evolving community and stakeholder expectations, and guide good practice with practical resources.

We are asking you:

- How do you demonstrate accountability in your current board role(s)?
- What resources would support good practice?
- Is 'over-boarding' an issue in Australia?
- Would you support annual director elections?



Culture and remuneration

Action Five

We will drive the adoption of practical frameworks on culture in AICD's education and resources. We will develop resources to support constructive challenge of management by directors and boards.

Action Six

We will work with members and stakeholders on principles to support the governance of remuneration.

We are asking you:

- Is culture a priority on your current board(s)?
- How are you measuring culture?
- Should the AICD develop governance principles on remuneration?
- What practical guidance should the AICD prioritise for members?

Why has the AICD developed this Forward Agenda?

The Royal Commission into Misconduct in the Banking, Financial Services and Superannuation Industry (Financial Services Royal Commission) has increased the spotlight on governance practice and raised questions – including from our members – about the standards and accountability expected of directors and boards in financial services.

Preceding Hayne, the Royal Commission into Institutional Responses to Child Sexual Abuse highlighted serious governance failures in organisations charged with the care and responsibility of children. The current Aged Care and upcoming Disability Services Royal Commission may identify further areas for review. These reviews and findings contribute to a broader focus on governance.

In our view, the AICD and our members must lead the changes we need to lift the practice of governance and bolster community trust in our system of governance.

To do this, we have identified the areas where the AICD believes we need to increase our focus, broaden our conversation or increase the resourcing and support for members. Many of the questions posed in this Consultation Paper are already the subject of debate and commentary – and this will continue. In our view, the AICD should have a leadership role in informed and measured debate, in guidance on good practice and in our own standards and commitments.

How can I provide feedback?

Provide your feedback on specific questions raised in this Consultation Paper (you can answer as many questions as you prefer – all optional) in the following ways:

Provide your views online

The AICD is asking members to provide their views through an interactive version of this Consultation Paper (hosted by independent research firm Ipsos).

To access the interactive survey, go to:
aicd.companydirectors.com.au/advocacy/the-forward-governance-agenda

Provide your views by email

Email the AICD your views on specific questions, or with general comments, to **policy@aicd.com.au**.

Provide your views in person

The AICD is hosting events in each capital city through April and May to discuss current governance issues, including an opportunity to ask AICD's MD & CEO Angus Armour FAICD questions (to learn more, visit **companydirectors.com.au/resources/royal-commission#royal**).

Please provide your views by Friday 17 May 2019



Standards and professionalism

Why is this a focus?

- The AICD is committed to lifting standards of conduct and professionalism in the practice of directorship, across all organisations and sectors of the economy.
- This objective aligns with the AICD's Vision and Mission, adopted by the Board in 2018:



Vision:

Strengthening society through world-class governance.



Mission:

To be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society.

- Similarly, the AICD's Constitution sets out the objects of the Institute as being (in part):

“Through education, to promote excellence, enterprise and integrity in the directors of all corporations, to improve their knowledge and skill with respect to their rights, duties and responsibilities, and to inculcate the highest standards of ethics amongst directors...”

- Clearly, the Financial Services Royal Commission's Final Report has increased the spotlight on governance practice and raised questions – including from our members – about the standards and accountability expected of directors and boards in financial services.
- But Commissioner Hayne's report does not stand alone. APRA's 2018 Prudential Report into the CBA is an insightful case study on governance, culture and accountability¹. This report put the 'Should We?' question onto the agenda – directors should inculcate within their organisations an ethical lens that might be obscured by the 'Can We?' focus of compliance and risk management.

- Not-for-profit organisations have also witnessed high-profile governance failures. Preceding Hayne, the Royal Commission into Institutional Responses to Child Sexual Abuse highlighted serious governance failures in organisations charged with the care and responsibility of children². The current Aged Care Royal Commission may identify further areas for review.
- In the AICD's view, no director could consider the recent governance failures in financial services, in not-for-profits, sporting codes, institutions responsible for vulnerable people, and in government, and be satisfied that standards of practice are always meeting community expectations.
- Lifting standards of practice and promoting professionalism in directorship demands greater clarity by the AICD in the expectations it sets for itself and its members, and in our work building the capability of Australian directors. It requires a stronger focus on professional ethics, competencies and fundamental duties of practising directors.
- As a starting point, the AICD proposes to review our standards and expectations of directors through our Member Code of Conduct and in our Director Professional Development obligations.

Action One: Review and strengthen the AICD's Member Code of Conduct

- The AICD will review and strengthen our Membership Code of Conduct, with a detailed review drawing on input from members and stakeholders.
- Member views are sought on the issues that should be considered in the review.

¹ The AICD has said that the APRA Report is required reading for all boards, not just those in financial services.

² The AICD has incorporated lessons from the Royal Commission into a dedicated *Governing for Vulnerable People* curriculum.

(i) About the Membership Code of Conduct

- The **AICD's Code of Conduct** sets out the standards of conduct that members of the Institute are expected to comply with, in respect of any corporate entity of which the member is a director.
- The Code of Conduct focuses predominantly on the fiduciary and legal duties of directors, setting out in clear language these core obligations of directorship.
- The expectation that AICD members will hold themselves to a high standard of conduct is reflected in the requirement for members to not engage in conduct likely to bring the organisations on which they serve into disrepute (clause 10) and to comply with the spirit, as well as the letter, of the law (clause 11).
- While compliance with the Code of Conduct is required of all members, breaches of the Code of Conduct do not automatically lead to suspension or disqualification from membership.
- Article 2.6 of the **AICD's Constitution** outlines the circumstances in which the AICD Board can resolve to expel or suspend a member, which include being convicted in criminal proceedings brought in connection with a breach of the Corporations Act; disqualification from managing corporations; or the conduct of a member being, in the opinion of the Board, "unbecoming of a Member or prejudicial to the objects, interests or reputation of the AICD". Article 2.6 sets out procedural requirements relating to expulsion or suspension of members.

AICD's Code of Conduct

Every member of the Australian Institute of Company Directors is expected to comply with a code of conduct determined by the Company Directors' Board of Directors from time to time. A member should, in respect of any corporate entity of which the Member is a director, comply with the following standards of conduct:

1. The member should act honestly, in good faith and in the best interests of the company as a whole.
2. The member has a duty to use care and diligence in fulfilling the functions of office and exercising the powers attached to that office.
3. The member should use the powers of office for a proper purpose, in the best interests of the company as a whole.
4. The member should recognise that the primary responsibility is to the company as a whole but may, where appropriate, have regard for the interest of other stakeholders of the company.
5. The member should not make improper use of information acquired as a director.
6. The member should not take improper advantage of the position of director.
7. The member should properly manage any conflict with the interests of the company.
8. The member has an obligation to be independent in judgement and actions and to take all reasonable steps to be satisfied as to the soundness of all decisions taken by the board of directors.
9. Confidential information received by the member in the course of the exercise of directorial duties remains the property of the company from which it was obtained and it is improper to disclose it, or allow it to be disclosed, unless that disclosure has been authorised by that company, or the person from whom the information is provided, or is required by law.
10. The member should not engage in conduct likely to bring discredit upon the company.
11. The member has an obligation, at all times, to comply with the spirit, as well as the letter, of the law and with the principles of this Code.

(ii) Why review the Code of Conduct?

- Membership of the AICD is voluntary and non-statutory. The AICD is not a regulatory body and our more than 43,000 members are drawn from organisations across the listed, private company, public sector and not-for-profit sectors, ranging in size and complexity. The AICD seeks to support all members in supporting strong standards of practice. Reflecting this, the current Code of Conduct focuses on fundamental obligations relevant to all directors, rather than prescriptive additional expectations of conduct or standards of practice.
- However, our Code is dated, being last updated in 2005. It is timely to reflect on whether it reflects the legitimate and current expectations of members and broader stakeholders.
- During public hearings of the Financial Services Royal Commission, the AICD received feedback from some members raising concerns about the conduct of boards and directors, implying support for higher expectations of conduct and clearer 'fit and proper' requirements in the Code.
- The current Code is silent on issues such as disclosure, culture (including the role and expectations on directors in guiding culture and purpose) and ethical conduct. The process by which complaints of breaches are dealt with is unclear in the Code itself (noting the AICD's constitution covers expulsion and suspension, including due process issues).

(iii) What could a review of the Code of Conduct consider?

- The AICD will conduct a review of the Code of Conduct. If progressed, the review would draw on examples of good practice in comparable organisations and seek member and stakeholder input over coming months.
- A review could consider and potentially clarify the procedures and systems for allegations of breaches or complaints to be considered, with due process and fairness as design principles.

Member views sought: Code of conduct

Questions	Suggested response options
<p>1. What areas should the AICD consider as possible inclusions in a review of the Code of Conduct? (Please select all that apply)</p>	<ul style="list-style-type: none"> • Set clear standards of practice expected of directors (for example, positive expression of fiduciary duties, engagement with stakeholders, managing conflicts, accountability) • Ethical decision-making in governance practice • Continuing professional development • Fit and proper person test for members • Uphold/support AICD vision and mission • Standards of conduct between members/others • Other (specify)
<p>2. What issues should the AICD consider in relation to complaints about potential breaches of the Code of Conduct? (Please select all that apply)</p>	<ul style="list-style-type: none"> • Process for complaints by members, about members • Process for complaints by others, about members • Due process and right to appeal any findings • Confidentiality and privacy of all parties • A separate 'code compliance' body for complaints • None – the AICD should not consider complaints • Other (specify)
<p>3. As a general indication, what circumstances would you consider appropriate for the AICD to review as future code breaches? (Please select all that apply)</p>	<ul style="list-style-type: none"> • Member subject to negative media in relation to governance practice • Member appears before a public inquiry or commission to address allegations of governance failures • Member under investigation by ASIC or other agency for alleged breach of governance laws • Member has a civil or criminal penalty imposed for breaches of governance laws • Member under investigation by law enforcement body for allegations of any serious criminal offence(s) • Member convicted of any serious criminal offence(s) • Member disqualified by ASIC, APRA, ACNC or a Court • Member alleged to have subjected another member to harassment, vilification or bullying • Member breaches AICD course or event codes of conduct (e.g. plagiarism) • None of the above

Action Two: Strengthen Director Professional Development with mandatory ethics focus

- The AICD will amend director professional development requirements to mandate that members must participate in formal training in ethics, and potentially other areas, annually.
- Member views are sought on this approach and the areas that could be considered for inclusion.

(i) About the AICD's Director Professional Development Requirements

- Director Professional Development (DPD) offers AICD members a structured framework through which they are able to demonstrate an ongoing commitment to their own professional development and a focus on maintaining the currency of their knowledge and skills.
- The AICD requires all members, other than those in the categories of Affiliate, Retired and Life Fellow, to undertake 60 units of Director Professional Development over each rolling three-year cycle for the duration of their membership ('mandatory DPD requirement').
- Full details of the AICD's DPD requirements are available online at: companydirectors.com.au/membership/director-professional-development
- Failure to meet the requirements results in members being unable to renew membership at any class other than Affiliate member.

(ii) What activities count towards the AICD's DPD requirements?

- DPD means activities, both formal and informal learning, undertaken to improve directors' skills and capabilities, linking to practices on the **Corporate Governance Framework**.
- Members can accrue DPD units for both formal and practical learning that they undertake to improve their capabilities as directors. DPD units can be accrued by professional development activities through the AICD or other organisations of appropriate standing, informal learning, practical experience and professional reading (with limits). Board meetings (paid or unpaid) and preparation associated with board roles are not eligible for DPD units.

- As examples of activities that meet DPD requirements and points applicable:

Example of activity	DPD Points
AICD short course (half-day)	5 points
AICD webinar (60 minutes or longer)	5 points
External short course, conference, seminar (half-day)	10 points
AICD Foundations of Directorship Program	30 points

(iii) Should the AICD mandate a focus on specific areas (such as ethics) in DPD?

- Currently, the AICD does not impose on members a requirement to focus on any aspect of the Corporate Governance Framework in meeting their rolling 60 points of DPD over a three-year period. All DPD units must, however, map to a governance competency in the practice of directors, boards, their organisations and interactions with stakeholders.
- The AICD is proposing to amend member DPD requirements to mandate that members must include annual DPD activities that focus on certain areas in the practice of directorship, including ethical decision-making³.
- An annual requirement would support practising directors in maintaining the currency of their skills and understanding of evolving regulatory, stakeholder and community expectations.
- Alternatively, members could be required to undertake a minimum number of (non-specific) DPD units annually, with the requirement to invest a certain amount in nominated areas (such as ethics) across a three-year rolling cycle.
- The AICD could provide members with resources to meet expanded DPD requirements, including options at no additional member cost. These resources would be regularly updated.

³ Some professional bodies mandate professional development requirements in areas of relevance to their sector. For example, solicitors in NSW are obligated to undertake CPD activities relating to ethics and professional practice, amongst other requirements, annually (NSW Law Society). Other bodies provide more flexibility to members but require annual CPD activities to incorporate at least one of a list of criteria including ethics (Institute of Actuaries) or a percentage focus on CPD activities relevant to registration or license (CAANZ).

(iv) What would a review of mandatory DPD requirements involve?

- If the AICD proceeds with this proposal, the Director Professional Development Steering Committee would be tasked with reviewing options for changes to the AICD's DPD scheme, for consideration by the Board.
- Options for mandating an annual focus on ethics in DPD would include consideration of the degree of focus and points required (for example, a minimum of 5 points), the timeframe (whether annually or over the current three-year rolling DPD cycle), and whether formal training (such as completion of regularly updated AICD training or webinars) is required.
- The review could consider whether other areas of practice warrant a similar focus (such as core directors' duties, management of conflicts, culture or financial literacy for directors), the minimum units and timeframes for such requirements (such as annual requirements, or within three-year periods), the level of auditing of compliance with mandatory DPD obligations, processes for member declarations and initiatives relevant to effective implementation and adoption.

Member views sought: DPD

Questions	Suggested response options
<p>4. Do you agree with the following statement? By meeting Director Professional Development (DPD) obligations, I demonstrate my commitment to the quality and currency of my directorship skills.</p>	<ul style="list-style-type: none"> • Yes • Somewhat • No • No view
<p>5. Would you support the AICD requiring a focus on Director Professional Development (DPD) activities in certain areas? (Please number all relevant, in order of priority, with 1 as the most important)</p>	<ul style="list-style-type: none"> • Ethics • Legal duties of directors • Conflicts of interest • Governance of Culture • Financial literacy for directors • Other (specify) • None – I do not support mandating DPD areas • No view
<p>6. Would you support the AICD requiring a focus on certain director professional development (DPD) areas as an annual requirement or over a three-year period (for greater flexibility)?</p>	<ul style="list-style-type: none"> • Annual requirement (e.g. a minimum of 5 points annually on a nominated area) • Over three-yearly cycle (e.g. a minimum of 15 points undertaken over a three-year period) • None – I do not support mandating DPD areas • No view
<p>7. If the AICD mandated a focus on ethics or other areas in director professional development (DPD) requirements, what resources should we develop to support members? (Please number all relevant, in order of priority, with 1 as the most important)</p>	<ul style="list-style-type: none"> • Webinar (at any time, no additional cost) • Online course (at any time, no additional cost) • Briefing or events (online, no additional cost) • Briefing or events (in person, no additional cost) • Targeted AICD short-course (at cost) • Recognition of external party courses/events • Other (specify) • No view



Directors' duties and stakeholders

Why is this a focus?

- The AICD supports the existing legal framing of directors' duties – including its enabling of consideration of stakeholder impacts by boards when acting in the best interests of the corporation, as discussed in the Final Report of the Financial Services Royal Commission.
- Corporate misconduct has raised questions about whether this occurs in practice and prompted calls for changes to elevate stakeholder considerations. The community needs to trust that we – as directors – take account of stakeholder, ethical and societal issues as part of our duties.

Action Three: Directors' duties and stakeholders

We will lead a conversation on directors' duties to test the understanding and application of the best interests duty in practice. We will work with directors, legal experts, stakeholders and policy-makers to support measured and informed discussion and offer practical guidance on duties.

(i) Understanding directors' duties

*"...The longer the period of reference, the more likely it is that the interests of shareholders, customers, employees and all associated with any corporation will be seen as converging on the corporation's continued long-term financial advantage. And long-term financial advantage will more likely follow if the entity conducts its business according to proper standards, treats its employees well and seeks to provide financial results to shareholders that, in the long run, are better than other investments of broadly similar risk... Regardless of the period of reference, the best interests of a company cannot be reduced to a binary choice. And financial services entities are no different. Pursuit of the best interests of a financial services entity is a more complicated task than choosing between the interests of shareholders and the interests of customers."*⁴

Financial Services Royal Commission Final Report (p403)

- Directors are subject to a range of legal duties, including those listed below⁵.



- The duty of directors to act in good faith in the best interests of the company has come under scrutiny in the context of the Financial Services Royal Commission, and the discussion is playing out in the context of a broader debate about the role of business in society.
- The AICD's view is that the 'best interests' duty is sound, and that legislative change is not required. We endorse the widely accepted view that the current formulation allows consideration of stakeholders beyond shareholders, including customers and employees.

⁴ Final Report of the Royal Commission into Misconduct in the Banking, Financial Services and Superannuation Industry, Vol 1, 403

⁵ See sections 180-183 of the Corporations Act 2001 (Cth) which largely codifies the common law. Directors are also subject to a number of other general duties and obligations in the Corporations Act including a duty to prevent insolvent trading, as well as responsibilities in relation to financial record keeping and financial reporting. Directors also have a range of other duties which arise from other legislation including the Australian Consumer Law, environmental legislation and workplace health and safety laws.

(ii) Considering stakeholder impacts

- It is clear, certainly in practical terms, that the best interests duty cannot be regarded in isolation to the interests of stakeholders.
- As we note in the Company Director Course, acting in a responsible and ethical manner towards stakeholders (such as customers, employees, community and the environment) is consistent with, and is typically necessary for, the promotion of the interests of the company and its sustainability. It is accepted that the framing of directors' duties allows directors to take the interests of stakeholders other than shareholders into account.
- It was for this reason that the inquiry into the social responsibility of corporations conducted by the former Corporations and Markets Advisory Committee (CAMAC) in 2006 concluded that the law was capable of keeping pace with changing societal expectations, and that no changes to the law on directors' duties were required.⁶
- Commissioner Hayne's articulation of the law in his Final Report underscores this. In relation to the requirement that directors exercise their powers and discharge their duties in good faith in the best interests of the corporation, he emphasises that it is the corporation that is the focus of their duties – and that demands consideration of more than the financial returns that will be available to shareholders in any particular period.⁷
- Commissioner Hayne also stresses that pursuit of the best interests of a financial services entity is a more complicated task than a binary choice between the interests of shareholders and the interests of customers, and that over time the interests of different stakeholders will converge.
- This complexity is reflected in case law, with some Courts finding that the interests of the general body of shareholders will not always and, in all circumstances, align with the interests of the company as a whole.⁸

(iii) Role of the board

- Boards operate in a complex environment and must have sufficient flexibility to consider what the best interests of the company are in the context of specific decisions, exercising appropriate judgment. This is fundamental to the role of the board.
- In our experience, directors understand that to build long-term value in their organisations, it is critical that the legitimate issues of stakeholders are considered. Recent research by the AICD and KPMG showed that directors consider employees and customers their most important stakeholders, ahead of shareholders including institutional investors.⁹ AICD surveys also indicate that directors have a strong emphasis on balancing the interests of stakeholders in decisions.¹⁰
- We recognise however that there is a perception amongst some in the community that corporate boards have a more simplistic approach to prioritisation of the interests of shareholders. This has led to calls for stakeholder considerations to be formally incorporated into the formulation of directors' duties, including in media and public commentary, and comparisons to models of directors' duties that explicitly reference stakeholders in overseas jurisdictions.¹¹ Others have noted support for a more explicit reference to long-term sustainability in company obligations.

⁶ Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Report*, December 2006. Separately, the AICD supports the re-establishment by government of a CAMAC-like body to support corporate law policy development. Such a body could consider an updated review of the scope of directors' duties, taking into account contemporary issues and evolving community expectations, as well as international experience and distinctions of the Australian corporate law environment.

⁷ Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Volume 1, 402

⁸ Amongst others, *Bell Group v Westpac* [2008] WASC 239, *ASIC vs Cassimatis* [2016] FCA 1023 and *United Petroleum vs Herbert Smith Freehills* [2018] ASCR 324. See also Professor Jason Harris, 'Shareholder primacy in changing times', The Supreme Court of New South Wales Corporate and Commercial Law Conference 2018, 12

⁹ Creating value and balancing stakeholder needs – the board's role. KPMG & AICD, March 2019. www.aicd.com.au

¹⁰ 2018 & 2019 polling of AICD members via our Director Sentiment Index, www.aicd.com.au

¹¹ For example, Fiona Guthrie AM, 'Reimagining the Corporation: Why we need to change the purpose of our biggest companies', Keynote address presented at the ACCC 2019 National Consumer Congress, <http://consumersfederation.org.au/reimagining-the-corporation-fiona-guthries-speech-to-the-national-consumer-congress/>. Separately, references to other jurisdictions include the United Kingdom, where section 172 of the Companies Act 2006 provides that directors have a duty to promote the success of the corporation for the benefit of members as a whole while having regard to (among other things) a non-exhaustive list of stakeholder interests. From 2019, companies will need to report on how directors are complying with these obligations (by way of a "section 172 statement" in strategic reports).

- In part, this perception has most recently been driven by evidence of the misconduct that came to light during the Financial Services Royal Commission. It is useful to note that the Financial Services Royal Commission was, in its terms of reference, an inquiry into misconduct. This focus necessarily highlighted examples of wrongdoing, or conduct at odds with community expectations. We must acknowledge, however, that the misconduct was widespread and has caused legitimate questions as to whether it was been driven by a myopic focus on profit.
- A common and broad understanding of the role of the board, as well as the scope of the best interests duty under Australian law, would improve the conversation on these complex issues.
- The AICD teaches that a focus on strong and respectful relationships with stakeholders is a fundamental building block of effective governance. An effective board proactively listens to the concerns of its stakeholders and consistently communicates its long-term vision and strategy. This requires an outward and inward focus by directors. The board should foster a constant conversation between the organisation and its key stakeholders. Transparency and accountability assure stakeholders that an organisation and its board is behaving responsibly.
- The AICD will consider practical measures to support the stakeholder 'voice' being considered in governance deliberations.

(iv) Supporting the 'stakeholder voice' as an input to boards

- The Financial Services Royal Commission noted the importance of boards receiving the 'right information' to discharge their functions. As the Commission's case studies showed, this is necessary to support boards in challenging management on significant issues that have the ability to affect the interests of customers, relationships with regulators and reputation more broadly.¹² Proactive assessment of stakeholder impacts by boards requires that the 'voice of the customer' and perspectives and interests of stakeholders are well articulated and understood by directors.
- We intend to review insights from other models as part of our research. For example, a range of formal and informal structures supporting worker and customer 'voice' are mandated or applied in European jurisdictions (from formal customer advisory councils, to legislative requirements for worker representation on supervisory boards for large companies).¹³
- While we do not support mandated models of engagement, we will draw on case studies and frameworks to support boards in practice.

¹² Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Volume 1, 400

¹³ For example, the UK Corporate Governance Code seeks to place an emphasis on improving the quality of the board and company's relationships with a wider range of stakeholders, and to highlight board responsibility for workplace policies and practices which reinforce a healthy culture. The Code contains a new Provision that asks boards to understand the views of the company's key stakeholders and describe how they have considered their interests in the annual report. It also sets out the following three engagement mechanisms and states that one or a combination should be used for engagement with the workforce: a director appointed from the workforce; a formal workforce advisory panel; or a designated non-executive director. In France, larger companies (with more than 1000 employees) must include at least one director representing employees while in Germany, for companies with at least 500 (but fewer than 2000) employees, one-third of the supervisory board are elected by employees. That representation jumps to half of the supervisory board when employee numbers reach 2000.

Member views sought: Directors' Duties and Stakeholders

Questions	Suggested response options
<p>8. Which of the following best describes your approach to applying the duty to act in the best interests of the company?</p>	<ul style="list-style-type: none"> • I consider the interests of shareholders/members as a whole • I consider stakeholder impacts as relevant to the interests of shareholders/members as a whole • I balance the interests of shareholders/ members and stakeholders • Unsure • No view
<p>9. What approaches does your board(s) currently use to capture stakeholder impacts and considerations? (Please select all that apply.)</p>	<ul style="list-style-type: none"> • Advice from management • Board engagement with investors/members • Board engagement with consumers/clients • Board engagement with employees/unions • Formal advisory committee/structures • Community forums/representatives • Media monitoring • Advice from external advisers • Other (specify)
<p>10. What measures could the AICD promote to support boards to demonstrate their consideration of broader stakeholder interests? (Please select all that apply)</p>	<ul style="list-style-type: none"> • Transparency in corporate reporting • Formal advisory structures/committee • Board composition measures (skills mix, consideration of stakeholder voice) • Improving community understanding of the role of boards • No view
<p>11. What actions could the AICD undertake to test and improve the understanding and application of duties in practice? (Please number all relevant, in order of priority, with 1 as the most important)</p>	<ul style="list-style-type: none"> • Survey AICD members on application • Roundtables with directors and stakeholders • Commission papers/event from leading legal experts to expand resources on duties in Australian context and case law • Updated guidance tools for directors • Other (specify)



Demonstrating accountability

Why is this a focus?

“Accountability is centrally important to any consideration of culture, governance and remuneration... Clear accountability is vital to effective governance. It ensures that risks are resolved, and resolved effectively. It fosters a culture where risks are managed soundly. It lies at the heart of the proper operation of any variable remuneration and incentive system. It is accountability that determines what consequences must follow when things go wrong (and where credit is due when things are done well).”¹⁴

Final Report of the Financial Services Royal Commission

- Boards carry responsibility and accountability for the success of an organisation. Directors must grapple with a rapidly changing business environment, a fast-paced news cycle and social media opportunities and challenges, shareholder activism, diverse stakeholder interests, disruptive technologies, heightened legal responsibilities and increasing disclosure obligations.¹⁵
- The demand for directors and boards to be accountable is only going to get stronger. In this context, distinction between the board and management is critically important, and carefully emphasised by Commissioner Hayne. The APRA Inquiry into CBA and the Financial Services Royal Commission also demonstrated the consequences that can flow from ineffective accountability frameworks in complex organisations.
- Clarifying the line between board and management roles and responsibilities is fundamental to building a constructive and effective relationship between board and management, and to avoid muddying the waters of accountability. Robust challenge of management and appropriate information flows to support the board in fulfilling its functions are critical to effective governance.
- While the concept of board accountability has always been an essential component of good governance, the regulatory landscape against which best practice is set continues to evolve.
- 2018 saw the phased introduction of the Banking Executive Accountability Regime (BEAR), which establishes accountability obligations for authorised deposit-taking institutions (ADIs), their senior executives and directors. Commissioner Hayne has recommended that the BEAR be extended to other APRA-regulated entities such as insurers and superannuation funds. While APRA will be focused on the extension of the BEAR regime, ASIC has announced a focus on both corporate accountability and individual accountability, at executive and board level, for breaches of the law.¹⁶
- Accountability will be a continuing regulator priority. Community, media and stakeholder demands on director accountability are also increasing¹⁷, and boards will need to respond.

Action Four: Support and clarify accountability for boards and directors

We will help boards adapt to evolving community expectations of accountability. We will build better understanding of the board's superintendence role, distinct from day-to-day management, to clarify directors' roles. We will consult with stakeholders and practising directors on options to support accountability with practical tools.

¹⁴ Final Report of the Royal Commission into Misconduct in the Banking, Financial Services and Superannuation Industry, Vol 1, 407

¹⁵ Australian Institute of Company Directors, *Company Director Course* notes 2019.

¹⁶ ASIC update on implementation of Royal Commission recommendations, <https://download.asic.gov.au/media/5011933/asic-update-on-implementation-of-royal-commission-recommendations.pdf>, February 2019, 13.

¹⁷ For listed entities in the ASX 300, the 2018 AGM season saw a record level of protest votes against director elections, and significant remuneration strikes against banks and other large corporate entities.

(i) Supporting directors in demonstrating accountability

- People should be held accountable when things go wrong. There must be consequences for inappropriate, unethical or unlawful behaviour, beyond immediate remediation.
- The AICD supported stronger penalties for corporate law breaches, recognising the need for penalties in ASIC-administered legislation to represent an adequate deterrent for misconduct.¹⁸
- At the same time, a highly politicised environment does not promote rational and constructive debate on complex issues, nor does placing unreasonable expectations on non-executive directors who are already exposed to the risk of personal liability and penalties.
- The AICD has long held concerns about the extent to which consistent increases in regulation and concerns over personal liability have the capacity to stifle an entrepreneurial spirit, responsible risk-taking and innovation.
- Honest directors acting carefully and diligently will sometimes make the wrong decision in hindsight and this should not trigger automatic calls for the imposition of liability or even, necessarily, an expectation of resignation.
- It is also important that expectations of non-executive directors are reasonable and do not blur the boundaries between the board and management. The separation of board and management is a hallmark of Australia's corporate governance system and provides important checks and balances. This was implicitly recognised in Commissioner Hayne's final report.¹⁹

Member views sought: accountability

Questions	Suggested Response options
<p>12. How do you hold yourself, and fellow board members, accountable in current practice?</p> <p>(Please select all that apply)</p>	<ul style="list-style-type: none"> • Clear delegation between management/board roles • Regular board reviews (self-assessed) • Regular board reviews (externally assessed) • Peer-to-peer feedback by directors • Demonstrating organisational values in practice • Transparency in reporting and disclosure • Chair/Board presentation/Q&A at AGM • Formal stakeholder engagement by board • Board engagement with staff • Proactive board renewal program • Resignation (e.g. serious governance failures) • Other (specify)
<p>13. What resources on board and director accountability would support good practice?</p> <p>(Please number all relevant, in order of priority, with 1 as the most important)</p>	<ul style="list-style-type: none"> • Guidance on ways directors hold themselves and fellow directors to account in practice • Case studies on accountability through AICD education and member communications • Resources / engagement with media and stakeholders to clarify role of the board and non-executive directors (versus management) • Other (specify)

¹⁸ Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth)

¹⁹ Financial Report of the Royal Commission into Misconduct in the Banking, Financial Services and Superannuation Industry, Vol 1, 400

(ii) Director commitments – is guidance needed?

- Undoubtedly, demands on directors, especially of listed companies, are growing, in line with expectations of stakeholders and regulators.²⁰
- This has stirred the issue of ‘overboarding’, a colloquial term used to describe directors who are perceived to have too many board roles, and may be challenged to dedicate adequate time to each commitment.
- Director overload is also under scrutiny internationally.²¹ Notably, the UK Corporate Governance Code now provides that additional external appointments should not be undertaken without prior approval of the board, with the reasons for permitting significant appointments to be explained in the annual report²², while the Hong Kong Corporate Governance Code provides that issuers must explain that any proposed non-executive director will be able to devote sufficient time to the board if the person will be holding their seventh (or more) listed issuer directorship.
- In Australia, proxy advisory firms and the Australian Shareholders’ Association (ASA) already apply guidelines that assess directors’ workloads based on numbers of board positions²³. This approach however does not consider relevant variables including the skill and experience of a particular director, the complexity of the various roles, or the challenges facing each organisation on whose board they sit, or other commitments.
- It is notable that there is already a trend towards directors holding fewer board roles. The majority of directors of ASX 200 companies do not hold a second board position at a company on the index, according to AICD data from the end of February 2019. Of the 1486 directors of Australia’s largest listed companies, only 227 held another ASX 200 role with the average number of board positions standing at 1.2.
- While concerns have been expressed on both a domestic and global level regarding director overload, there are clear benefits that flow from multiple directorships, including cross-pollination of learnings from different sectors, and enhancement of ability to challenge management.²⁴
- The AICD is opposed to blunt regulation in this area. Individual directors, and the boards on which they sit, are best placed to assess commitments. However, boards and directors should actively and critically consider the time that will be required to effectively discharge their duties, including sector-specific issues and corporate governance developments. There will be an increasing need to demonstrate to investors and other stakeholders that they are getting it right.

²⁰ The 4th edition of the ASX Corporate Governance Council’s Principles and Recommendations suggests that any appointment letter for a non-executive director should include the requirement to notify the entity of, or to seek the entity’s approval before accepting, any new role that could impact upon the time commitment expected of the director (see Recommendation 1.3 <https://www.asx.com.au/regulation/corporate-governance-council.htm>).

²¹ Research published in the Harvard Law School Forum on Corporate Governance and Financial Regulation examines conflicting evidence in corporate finance literature on the effect of multiple directorships on firm value and performance. Its authors note that “busy boards are a global phenomenon”. Stephen P. Ferris, Narayanan Jayaraman & Min-Yu Liao, “Better Directors or Distracted Directors? An International Analysis of Busy Boards”, <https://corpgov.law.harvard.edu/2017/09/16/better-directors-or-distracted-directors-an-international-analysis-of-busy-boards/>. See also <https://aicd.companydirectors.com.au/advocacy/governance-leadership-centre/practice-of-governance/director-overload-under-increasing-scrutiny>

²² <https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code>

²³ For example, ISS and ASA will usually recommend a vote against a director if they sit on more than a total of five listed boards, and CGI Glass Lewis will recommend a vote against a director who serves on more than six major boards (in some circumstances, depending on workload and capacity, five major boards). In each case, a chair role is treated as two board positions. Ownership Matters and ACSI will assess director capacity on a case by case basis. ACSI’s voting guidelines note that the board must determine whether a prospective or existing director is capable of discharging their duties to the company, in light of other directorships they hold. This will involve considerations such as time constraints, complexity and workload. To ensure the chair has the capacity to do the job, the board should consider limiting the number of chair roles to a single listed entity, amongst other matters (www.acsi.org.au).

²⁴ In its submission to the Financial Services Royal Commission, Treasury acknowledged that large, complex financial firms require directors with time and ability to manage other commitments. However, they rightly noted that enforcing too narrow a range of current experience and exposure on directors may reduce their ability to draw lessons from other businesses. Further, limiting potential income may reduce the attractiveness of being a professional director, thus reducing the pool and quality of director candidates: Submission on Key Policy Issues, Background Paper 24 www.financialservices.royalcommission.gov.au.

Member views sought: director commitments

Questions	Suggested response options
14. Do you support the AICD prioritising guidance on board commitments? (Please select one)	<ul style="list-style-type: none"> • Yes • No • Unsure • No View
15. How many directorships (or equivalent) do you currently hold? (include director-equivalent roles)	0, 1, 2, 3, 4, 5, 6 – more than 6
16. What issues should any AICD guidance consider? (Please select all that apply)	<ul style="list-style-type: none"> • Skill and experience • Numbers of directorships (including chair or committee chair roles) • Specific roles and responsibilities (e.g. chair of board or committee) • Complexity of organisation • Distinctions between listed companies, not-for-profit and private and public sector entities

(iii) Annual director elections for listed entities

- Under the ASX Listing Rules, the maximum term for a director on a listed company board, other than the managing director, is three years (or the third AGM following the director's appointment, whichever is longer) before they are required to stand for re-election.²⁵
- By contrast, the United Kingdom introduced annual re-elections for directors of entities in the FTSE 350 in 2010 and extended the requirement to all companies with a premium listing in 2018; the Toronto Stock Exchange introduced annual re-elections in 2012; and there has been a push in the United States from institutional investors for companies to move to annual re-elections.²⁶
- Treasury raised the issue of annual re-elections in a submission to the Financial Services Royal Commission in July 2018, noting that they are 'considered to provide a regular and timely mechanism for boards and shareholders to consider individual director performance, thus improving the focus of directors on the need to be engaged in their role.'
- Treasury also highlighted risks, noting that '*criticisms of annual re-elections include that it would incentivise directors to take a short-term approach, may reduce the experience and effectiveness of non-executive directors in challenging management, and may impose additional compliance costs*'²⁷.
- Some investor groups have supported a move to more regular elections. For example, State Street Global Advisers has argued that '*annual director elections improve accountability and encourage board members to be more responsive to shareholder interests*'.²⁸
- In 2012, the Corporations and Markets Advisory Committee (CAMAC) was charged with considering several matters concerning the annual general meeting (AGM). While this work was not concluded given the abolition of CAMAC, the draft paper noted that '*the right of shareholders to elect, as well as remove, directors is fundamental to ensuring managerial accountability*.' CAMAC observed that '*any move in Australia towards annual election of directors may have significant implications for board accountability, as directors would have to justify their position each year. It would also have implications for the two strikes rule*'.²⁹

²⁵ ASX Listing Rules 14.4-14.5

²⁶ An ISS study on board accountability practices in the US noted that in the past ten years, an increasing number of companies have adopted annual director elections in each constituent index of the S&P 1500. A majority of companies in each of the S&P 500, S&P 400, and S&P 600 now hold annual director elections, but the growth trend of annual elected boards has slowed: <https://www.issgovernance.com/library/board-accountability-practices-review/>

²⁷ Submission on Key Policy Issues, Background Paper 24, <https://financialservices.royalcommission.gov.au>, 17

²⁸ <https://www.ssga.com/apac/au/institutional-investors/en/our-insights/viewpoints/board-accountability-in-australia.html>

²⁹ Corporations and Markets Advisory Committee, The AGM and Shareholder Engagement, Discussion paper, [http://www.camac.gov.au/camac/camac.nsf/byheadline/pdfdiscussion+papers/\\$file/agm.pdf](http://www.camac.gov.au/camac/camac.nsf/byheadline/pdfdiscussion+papers/$file/agm.pdf), September 2012, 98.

- The AICD has previously opposed annual re-elections, noting the risk that they could promote short-term thinking by boards. However, we acknowledge that annual re-elections of non-executive directors of listed entities may serve to facilitate rigorous board and shareholder review of director performance and enhance accountability. Voting on election and re-election of directors is a core mechanism by which shareholders can hold directors to account – along with:
 - The ability under the Corporations Act to requisition or call a general meeting, propose resolutions or ask questions about the management of the company.³⁰
 - The non-binding vote on the remuneration report required by the Corporations Act, which may trigger the two strikes rule; and
 - The statutory derivative action (a mechanism in the Corporations Act which allows shareholders to bring claims in the name of, and on behalf of, the company in which they held shares – including against the company’s directors for alleged breaches of the company’s constitution or breaches of duty).

Member views sought: annual director elections

Questions	Suggested response options
17. Would you support review of the merits of annual director elections for listed entity boards? (Please select one)	<ul style="list-style-type: none"> • Yes • No • Unsure • No view
18. Do you consider that existing accountability mechanisms for directors are adequate? (Please select one)	<ul style="list-style-type: none"> • Yes • No • Unsure • No view

³⁰ Under section 249D of the Corporations Act, the directors of a company must call and arrange to hold a general meeting on the request of members with at least 5% of the votes that may be cast at the general meeting; under section 249F, members with at least 5% of the votes that may be cast at a general meeting of the company may call, and arrange to hold, a general meeting (with the members calling the meeting paying the expenses of calling and holding the meeting); under section 249N members with at least 5% of the votes that may be cast on the resolution or at least 100 members who are entitled to vote at a general meeting may give a company notice of a resolution that they propose to move at a general meeting and under section 250S the chair of the AGM must allow a reasonable opportunity for the members as a whole at the meeting to ask questions about or make comments on the management of the company.



Governance of culture and remuneration

Why is this a focus?

Commissioner Hayne made observations on the intersection of culture, governance and remuneration impacting misconduct in financial services entities. There were very clear criticisms of systems of bonuses and rewards that can encourage unethical behaviour, and the lack of insight into corporate culture.

*“Failings of organisational culture, governance arrangements and remuneration systems lie at the heart of much of the misconduct examined in this Commission. Improvements in the culture of financial services entities, their governance arrangements and their remuneration systems should reduce the risk of misconduct in future. Culture, governance and remuneration march together. Improvements in one area will reinforce improvements in others; inaction in one area will undermine progress in others.”*³¹

Action Five: Governance of culture

We will drive the adoption of practical frameworks on culture in AICD’s education and resources. We will develop frameworks to support constructive challenge of management and guidance to improve the quality of information provided to boards to enable them to effectively discharge their governance duties.

(i) Culture

- The AICD teaches that the heart of contemporary governance is the issue of values, and the question of what is right and wrong. These matters are inextricably linked to organisational culture.

- As we note in the Company Directors Course, *‘[i]t is essential that directors are familiar with their duties and obligations at law as these set the threshold for expected behaviours. Directors can build then upon the legal requirements to establish the governance framework and culture of the organisation having regard to relevant governance principles, standards and codes.’*³²
- Culture represents the shared values, assumptions and beliefs that shape the behaviour of the people involved in an organisation. It can often seem like a nebulous concept that is difficult to oversee, control and homogenise (particularly in the context of large and complex organisations).
- While it is true that culture is deep-seated and can be difficult to change, boards regularly make decisions that shape the kind of organisation they govern, and those decisions will have a vital impact on the organisation’s culture and performance.
- One of the most critical drivers of culture is leadership of the organisation, and the board has a pivotal role in selecting and monitoring the most important of these leadership roles - the CEO.
- Boards also have an important role to play in approving the governance policies and frameworks that drive behaviour throughout an organisation. These include values and codes of conduct, risk and accountability frameworks, and other corporate governance policies.
- As the AICD teaches, *‘[a]t the heart of contemporary governance is the issue of ethics, and the question of what is right and wrong conduct. It goes beyond merely obeying the law to actually doing the right thing. Business ethics is the way in which companies formulate an answer to this question in what they do in business and in the wider social environment. Ethics move a board above and beyond basic compliance.’*³³

³¹ Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Volume 1, 412.

³² *Company Directors Course* (notes), Australian Institute of Company Directors, 2019

³³ *Company Directors Course* (notes), Australian Institute of Company Directors 2019

- Culture is an increasing focus for regulators as a core component of good governance. For example, the recently revised ASX Corporate Governance Council's Principles and Recommendations includes the principle that a listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly. Similarly, the AICD's own recently revised Not-for-profit Governance Principles includes the principle that the board models and works to instil a culture that supports the organisation's purpose and strategy.³⁴
- Commissioner Hayne recommended that all financial services entities should, as often as reasonably possible, take proper steps to assess the entity's culture and its governance; identify any problems with that culture and governance; deal with those problems; and determine whether the changes it has made have been effective. While this recommendation is naturally confined to financial services entities, directors of all companies – not just those in financial services – should consider how and where governance frameworks can be strengthened.
- Boards will need to consider afresh how best to assess culture and governance, including metrics, stakeholders with whom to engage, and any independent, external support that may be required. The AICD must also step up, by providing more practical resources and guidance to directors to help them discharge their important responsibilities in superintendence of culture.

Member views sought: governance of culture

Questions	Suggested response options
19. In your current board role(s), how would you rate your board(s) focus on oversight of culture? (Please select one)	<ul style="list-style-type: none"> • Significant focus – high priority for board, regularly assessed and discussed • Ongoing focus – regularly considered • Evolving focus – increasingly considered • Limited focus – not a feature of board agenda • No view
20. What factors do you consider in your current board(s) role when assessing organisational culture? (Please select all that apply)	<ul style="list-style-type: none"> • People metrics (e.g. engagement, NPS, turnover, staff training) • Performance management, learning and on-going development • WHS (e.g. incidents, near-misses, accountability) • Whistleblowing incidents/complaints • Breaches of code of conduct • Risk (e.g. financial and non-financial risk metrics and management, internal accountabilities) • Innovation (e.g. new products, speed to market) • Remuneration – company and individual performance; financial and non-financial risks • Other (specify)
21. How well is organisational culture understood by your board(s)?	<ul style="list-style-type: none"> • Very well/Well/Somewhat/Limited/Not at all/No view
22. What tools or resources should the AICD prioritise on culture? (Please number all relevant, in order of priority, with 1 as the most important)	<ul style="list-style-type: none"> • Short-form aid for directors outlining approaches to measuring culture, and questions and steps directors can take to supplement results • Stand-alone course on governance of culture • Formal culture diagnostic tool • Practical case studies on culture metrics, oversight • None of the above • Other (specify)

³⁴ <https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/not-for-profit-resources/nfp-principles/pdf/06911-4-adv-nfp-governance-principles-report-a4-v11.ashx>

³⁵ Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Volume 1, 2

Action Six: Governance of Remuneration

We will bring directors, investors and stakeholders together to promote a shared focus on long-term value creation in the governance of remuneration. We will develop principles-based guidance on remuneration governance issues.

(ii) Governance of remuneration

- Commissioner Hayne observed that there can be no doubt that remuneration practices can drive, and in Australia have driven, conduct of staff that is not consistent with the interests of the customer.
- The final report was highly critical of the approach to remuneration in the financial services industry, and the signals it gave about what was valued within an organisation: *'Rewarding misconduct is wrong. Yet incentive, bonus and commission schemes throughout the financial services industry have measured sales and profit, but not compliance with the law and proper standards. Incentives have been offered, and rewards have been paid, regardless of whether the sale was made, or profit derived, in accordance with law. Rewards have been paid regardless of whether the person rewarded should have done what they did'*³⁵.
- Variable remuneration, when designed appropriately and properly implemented, can effectively drive performance in accordance with strategy. The AICD also supports principles-based approaches to remuneration guidance (as opposed to a prescriptive approach). In the same way as there is no 'one-size fits all' approach to governance arrangements, so too must remuneration structures be tailored to each organisation (with strategy being a key consideration).
- Irrespective of any policy reform in this area, organisations will need to review their remuneration frameworks closely for alignment to their desired culture. As part of this, organisations should consider whether staff are properly rewarded for 'doing the right thing' (for example, identifying a breach of the law). It would also involve reviewing the appropriateness of performance metrics used (including non-financial metrics), whether robust assessment occurs (that considers both what has been achieved and how it has been achieved), and whether individuals are adequately held to account through remuneration outcomes.
- Many of the principles relevant to governance of remuneration have more general application, but for listed entities in particular, the issue of remuneration has the potential to be fraught. Boards have responsibility for setting the remuneration of the CEO and key management personnel, and oversight of remuneration policy more broadly, but in the context of executive remuneration any changes require shareholder and proxy adviser support. This can be difficult for boards of listed entities to manage, given the levers available to shareholders in the Corporations Act, including the two strikes rule, and strong views from some shareholders and proxy advisers on how remuneration should be structured (including the nature of metrics and targets to apply).
- If a listed entity determines that remuneration structures should change (including because they do not sufficiently align with desired culture), the market reality is that it is very difficult to implement change without investor and proxy adviser support. We believe that further dialogue and debate on these issues is critical to driving change, and that the AICD can play a constructive role.
- More generally, we believe that we need to provide more support for directors on this important topic than we have done in the past, and seek views on where we should direct our efforts.

Member views sought: governance of remuneration

Questions	Suggested response options
23. Should the AICD prioritise developing principles-based guidance on governance of remuneration (in collaboration with experts and stakeholders)? (Please select one)	<ul style="list-style-type: none"> • Yes • No • No View • Unsure
24. What topics should any principles-guidance cover? (Please select all that apply)	<ul style="list-style-type: none"> • Roles and responsibilities • Setting metrics • Managing conflicts of interest • Information flows to the board • Performance assessment • Culture ‘consequences’ • Investor and proxy adviser engagement • Role of the board in reviewing organisation-wide remuneration structures • Other (specify)
25. Does your board(s) link CEO variable pay to factors relevant to organisational culture? (Please select one)	<ul style="list-style-type: none"> • Yes • No • Unsure • No View • (If Yes, please provide examples)
26. Do you have any other comments on the Consultation Paper that you wish to provide?	<ul style="list-style-type: none"> • If Yes, please specify

Appendix

Standards and professionalism

Member views sought: code of conduct (after page 7)

1. What areas should the AICD consider as possible inclusions in a review of the Code of Conduct?

Please select all that apply.

- | | |
|--|--------------------------|
| Set clear standards of practice expected of directors (for example, positive expression of fiduciary duties, engagement with stakeholders, managing conflicts, accountability) | <input type="checkbox"/> |
| Ethical decision-making in governance practice | <input type="checkbox"/> |
| Continuing professional development | <input type="checkbox"/> |
| Fit and proper person test for members | <input type="checkbox"/> |
| Uphold/support AICD vision and mission | <input type="checkbox"/> |
| Standards of conduct between members/others | <input type="checkbox"/> |
| Other (Please specify): | |

2. What issues should the AICD consider in relation to complaints about potential breaches of the Code of Conduct?

Please select all that apply.

- | | |
|--|--------------------------|
| Process for complaints by members, about members | <input type="checkbox"/> |
| Process for complaints by others, about members | <input type="checkbox"/> |
| Due process and right to appeal any findings | <input type="checkbox"/> |
| Confidentiality and privacy of all parties | <input type="checkbox"/> |
| A separate 'code compliance' body for complaints | <input type="checkbox"/> |
| None – the AICD should not consider complaints | <input type="checkbox"/> |
| Other (Please specify): | |

3. As a general indication, what circumstances would you consider appropriate for the AICD to review as future code breaches?

Please select all that apply.

- | | |
|---|--------------------------|
| Member subject to negative media in relation to governance practice | |
| Member appears before a public inquiry or commission to address allegations of governance failures | <input type="checkbox"/> |
| Member under investigation by ASIC or other agency for alleged breach of governance laws | <input type="checkbox"/> |
| Member has a civil or criminal penalty imposed for breaches of governance laws | <input type="checkbox"/> |
| Member under investigation by law enforcement body for allegations of any serious criminal offence(s) | <input type="checkbox"/> |
| Member convicted of any serious criminal offence(s) | <input type="checkbox"/> |
| Member disqualified by ASIC, APRA, ACNC or a Court | <input type="checkbox"/> |
| Member alleged to have subjected another member to harassment, vilification or bullying | <input type="checkbox"/> |
| Member breaches AICD course or event codes of conduct (e.g. plagiarism) | <input type="checkbox"/> |
| None of the above | <input type="checkbox"/> |

Member views sought: director professional development (after page 9)

<p>4. Do you agree with the following statement?</p> <p><i>By meeting Director Professional Development (DPD) obligations, I demonstrate my commitment to the quality and currency of my directorship skills.</i></p> <p>Please select one</p>	Yes	<input type="checkbox"/>
	Somewhat	<input type="checkbox"/>
	No	<input type="checkbox"/>
	No view	<input type="checkbox"/>
<p>5. Would you support the AICD requiring a focus on Director Professional Development (DPD) activities in certain areas?</p> <p>Please number all relevant, in order of priority (with 1 as the most important).</p>	Ethics	<input type="checkbox"/>
	Legal duties of directors	<input type="checkbox"/>
	Conflicts of interest	<input type="checkbox"/>
	Governance of Culture	<input type="checkbox"/>
	Financial literacy for directors	<input type="checkbox"/>
	Other (specify)	<input type="checkbox"/>
	None – I do not support mandating DPD areas	<input type="checkbox"/>
	No view	<input type="checkbox"/>
<p>6. Would you support the AICD requiring a focus on certain director professional development (DPD) areas as an annual requirement or over a three-year period (for greater flexibility)?</p> <p>Please select one</p>	Annual requirement (e.g. a minimum of 5 points annually on a nominated area)	<input type="checkbox"/>
	Over three-yearly cycle (e.g. a minimum of 15 points undertaken over a three-year period)	<input type="checkbox"/>
	None – I do not support mandating DPD areas	<input type="checkbox"/>
	No view	<input type="checkbox"/>
<p>7. If the AICD mandated a focus on ethics or other areas in director professional development (DPD) requirements, what resources should we develop to support members?</p> <p>Please number all relevant, in order of priority (with 1 as the most important).</p>	Webinar (at any time, no additional cost)	<input type="checkbox"/>
	Online course (at any time, no additional cost)	<input type="checkbox"/>
	Briefing or events (online, no additional cost)	<input type="checkbox"/>
	Briefing or events (in person, no additional cost)	<input type="checkbox"/>
	Targeted AICD short-course (at cost)	<input type="checkbox"/>
	Recognition of external party courses/events	<input type="checkbox"/>
	No view	<input type="checkbox"/>
Other (please specify)		

Directors' duties and stakeholders

Member views sought: directors' duties & stakeholders (after page 12)

8. Which of the following best describes your approach to applying the duty to act in the best interests of the company? Please select one	I consider the interests of shareholders/members as a whole	<input type="checkbox"/>
	I consider stakeholder impacts as relevant to the interests of shareholders/members as a whole	<input type="checkbox"/>
	I balance the interests of shareholders/ members and stakeholders	<input type="checkbox"/>
	Unsure	<input type="checkbox"/>
	No view	<input type="checkbox"/>
9. What approaches does your board(s) currently use to capture stakeholder impacts and considerations? Please select all that apply.	Advice from management	<input type="checkbox"/>
	Board engagement with investors/members	<input type="checkbox"/>
	Board engagement with consumers/clients	<input type="checkbox"/>
	Board engagement with employees/unions	<input type="checkbox"/>
	Formal advisory committee / structures	<input type="checkbox"/>
	Community forums/representatives	<input type="checkbox"/>
	Media monitoring	<input type="checkbox"/>
	Advice from external advisers	<input type="checkbox"/>
Other (specify)		
10. What measures could the AICD promote to support boards to demonstrate their consideration of broader stakeholder interests? Please select all that apply	Transparency in corporate reporting	<input type="checkbox"/>
	Formal advisory structures / committee	<input type="checkbox"/>
	Board composition measures (skills mix, consideration of stakeholder voice)	<input type="checkbox"/>
	Improving community understanding of the role of boards	<input type="checkbox"/>
	No view	<input type="checkbox"/>
11. What actions could the AICD undertake to test and improve the understanding and application of duties in practice? Please number all relevant, in order of priority (with 1 as the most important).	Survey AICD members on application	<input type="checkbox"/>
	Roundtables with directors and stakeholders	<input type="checkbox"/>
	Commission papers / event from leading legal experts to expand resources on duties in Australian context and case law	<input type="checkbox"/>
	Updated guidance for directors	<input type="checkbox"/>
	Other (specify)	

Demonstrating accountability

Member views sought: demonstrating accountability (after page 16)

<p>12. How do you hold yourself, and fellow board members, accountable in current practice?</p> <p>Please select all that apply.</p>	Clear delegation between management/board roles	<input type="checkbox"/>
	Regular board reviews (self-assessed)	<input type="checkbox"/>
	Regular board reviews (externally assessed)	<input type="checkbox"/>
	Peer to peer feedback by directors	<input type="checkbox"/>
	Demonstrating organisational values in practice	<input type="checkbox"/>
	Transparency in reporting and disclosure	<input type="checkbox"/>
	Chair/Board presentation/Q&A at AGM	<input type="checkbox"/>
	Formal stakeholder engagement by board	<input type="checkbox"/>
	Board engagement with staff	<input type="checkbox"/>
	Proactive board renewal program	<input type="checkbox"/>
	Resignation (e.g. serious governance failures)	<input type="checkbox"/>
Other (specify)		
<p>13. What resources on board and director accountability would support good practice?</p> <p>Please number all relevant, in order of priority (with 1 as the most important).</p>	Guidance on ways directors hold themselves and fellow directors to account in practice	<input type="checkbox"/>
	Case studies on accountability through AICD education and member communications	<input type="checkbox"/>
	Resources / engagement with media and stakeholders to clarify role of the board and non-executive directors (versus management)	<input type="checkbox"/>
	Other (specify)	

Member views sought: overboarding

<p>14. Do you support the AICD prioritising guidance on board commitments?</p> <p>Please select one</p>	Yes	<input type="checkbox"/>
	Somewhat	<input type="checkbox"/>
	No	<input type="checkbox"/>
	No view	<input type="checkbox"/>
<p>15. How many directorships (or equivalent) do you currently hold? (include director-equivalent roles)</p> <p>Please select one</p>	None (0)	<input type="checkbox"/>
	1	<input type="checkbox"/>
	2	<input type="checkbox"/>
	3	<input type="checkbox"/>
	4	<input type="checkbox"/>
	5	<input type="checkbox"/>
	6	<input type="checkbox"/>
	More than 6	<input type="checkbox"/>

16. What issues should any AICD guidance consider? Please select all that apply.	Skills and experience	<input type="checkbox"/>
	Numbers of directorships (including chair or committee chair roles)	<input type="checkbox"/>
	Specific roles and responsibilities (e.g. chair of board or committee)	<input type="checkbox"/>
	Complexity of organisation	<input type="checkbox"/>
	Distinctions between listed companies, not-for-profit and private and public sector entities	<input type="checkbox"/>

Member views sought: annual director elections

17. Would you support review of the merits of annual director elections for listed entity boards? Please select one	Yes	<input type="checkbox"/>
	Somewhat	<input type="checkbox"/>
	No	<input type="checkbox"/>
	No view	<input type="checkbox"/>

18. Do you consider that existing accountability mechanisms for directors are adequate? Please select one	Yes	<input type="checkbox"/>
	No	<input type="checkbox"/>
	Unsure	<input type="checkbox"/>
	No view	<input type="checkbox"/>

Culture and remuneration

Member views sought – governance of culture (after page 19)

19. In your current board role(s), how would you rate your board(s) focus on oversight of culture? Please select one	Significant focus – high priority for board, regularly assessed and discussed	<input type="checkbox"/>
	Ongoing focus – regularly considered	<input type="checkbox"/>
	Evolving focus – increasingly considered	<input type="checkbox"/>
	Limited focus – not a feature of board agenda	<input type="checkbox"/>
	No view	<input type="checkbox"/>

20. What factors do you consider in your current board(s) role when assessing organisational culture? Please select all that apply.	People metrics (e.g. engagement, NPS, turnover, staff training)	<input type="checkbox"/>
	Performance management, learning and on-going development.	<input type="checkbox"/>
	WHS (e.g. incidents, near-misses, accountability)	<input type="checkbox"/>
	Whistleblowing incidents/complaints	<input type="checkbox"/>
	Breaches of code of conduct	<input type="checkbox"/>
	Risk (e.g. financial and non-financial risk metrics and management, internal accountabilities)	<input type="checkbox"/>
	Innovation (e.g. new products, speed to market)	<input type="checkbox"/>
	Remuneration – company and individual performance; financial and non-financial risks	<input type="checkbox"/>
Other (specify)		

21. How well is your entity's organisational culture understood by your board(s)? Please select one	Very well	<input type="checkbox"/>
	Well	<input type="checkbox"/>
	Somewhat	<input type="checkbox"/>
	Limited	<input type="checkbox"/>
	Not at all	<input type="checkbox"/>
	No view	<input type="checkbox"/>

22. What tools or resources should the AICD prioritise on culture? Please number all relevant, in order of priority (with 1 as the most important).	Short-form aid for directors outlining approaches to measuring culture, and questions and steps directors can take to supplement results	<input type="checkbox"/>
	Stand-alone course on governance of culture	<input type="checkbox"/>
	Formal culture diagnostic tool	<input type="checkbox"/>
	Practical case studies on culture metrics, oversight	<input type="checkbox"/>
	None of the above	<input type="checkbox"/>
	Other (specify)	

Member views sought – governance of remuneration (after page 19)

23. Should the AICD prioritise developing principles-based guidance on governance of remuneration (in collaboration with experts and stakeholders)? Please select one	Yes	<input type="checkbox"/>
	No	<input type="checkbox"/>
	No view	<input type="checkbox"/>
	Unsure	<input type="checkbox"/>

24. What topics should any principles-guidance cover? Please select all that apply	Roles and responsibilities	<input type="checkbox"/>
	Setting metrics	<input type="checkbox"/>
	Managing conflicts of interest	<input type="checkbox"/>
	Information flows to the board	<input type="checkbox"/>
	Performance assessment	<input type="checkbox"/>
	Culture 'consequences'	<input type="checkbox"/>
	Investor and proxy adviser engagement	<input type="checkbox"/>
	Role of the board in reviewing organisation-wide remuneration structures	<input type="checkbox"/>
Other (specify)		

26. Do you have any other comments on the Consultation Paper that you wish to provide?	
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Thank you for participating in this consultation.
Please tell us about yourself and your governance roles

The AICD would welcome members providing their name and contact details (optional).	Name
	Email
	Preferred telephone

Your gender? Please select one	Male <input type="checkbox"/>	Are you currently in a director role? Please select one	Yes <input type="checkbox"/>
	Female <input type="checkbox"/>		No <input type="checkbox"/>
	Prefer not to say <input type="checkbox"/>		

Are you an AICD member? Please select one	Yes <input type="checkbox"/>
	No <input type="checkbox"/>

What is your AICD membership grade? Please select one	AAICD <input type="checkbox"/>
	MAICD <input type="checkbox"/>
	GAICD <input type="checkbox"/>
	Fellow <input type="checkbox"/>
	LifeFellow <input type="checkbox"/>
	I am not a member of the AICD <input type="checkbox"/>

If you are a director, please tell us about your primary board role. Select most relevant for your primary board role	Sector	Director Role	Size
	Publicly listed Australian entity <input type="checkbox"/>	Non-executive Director <input type="checkbox"/>	Small (<20 staff) <input type="checkbox"/>
	Private/non-listed Australian entity <input type="checkbox"/>	Executive Director <input type="checkbox"/>	Medium (21-199 staff) <input type="checkbox"/>
	Not-for profit entity <input type="checkbox"/>	Chair of Committee <input type="checkbox"/>	Large (200+ staff) <input type="checkbox"/>
	Public sector/government body <input type="checkbox"/>	Chair of Board <input type="checkbox"/>	
	Overseas entity <input type="checkbox"/>	Other <input type="checkbox"/>	