



# Evaluating Board Performance

Using the ACNC Governance Standards

**BETTER BOARDS CONFERENCE, 3 AUGUST 2019**

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LEADERSHIP. CLARITY. ACTION.

# Why do you

- ▶ Evaluate board performance?
- ▶ Evaluate individual director performance?
- ▶ Report on evaluations to stakeholders?



# Bob Garratt's fundamentals

- ▶ A director's primary loyalty is to the company as a separate legal entity
- ▶ Respecting the board's collegiality and collective responsibility
- ▶ The chairman is the 'boss of the board' and the CEO is the 'boss of the daily operations of the company'
- ▶ The board must develop effective annual selection, induction, evaluation, development and renewal processes to keep itself healthy and sufficiently diverse
- ▶ The board must ensure its connectedness to the rest of the organisation to test quickly the effectiveness of its policies and strategies, and have the flexibility to learn from them

# Director Duties

- ▶ Statutory
  - ▶ Corporations Act, other legislation
- ▶ Regulatory
  - ▶ Trade practices, **ACNC** & other standards, codes, etc.
- ▶ Fiduciary
  - ▶ Societal expectations of trust in individuals in positions of responsibility

# ACNC approach

**Revocation**

**Sanctions**

**Compliance  
investigations**

**Assisted compliance**

**Education and support**

# ACNC Governance Standards

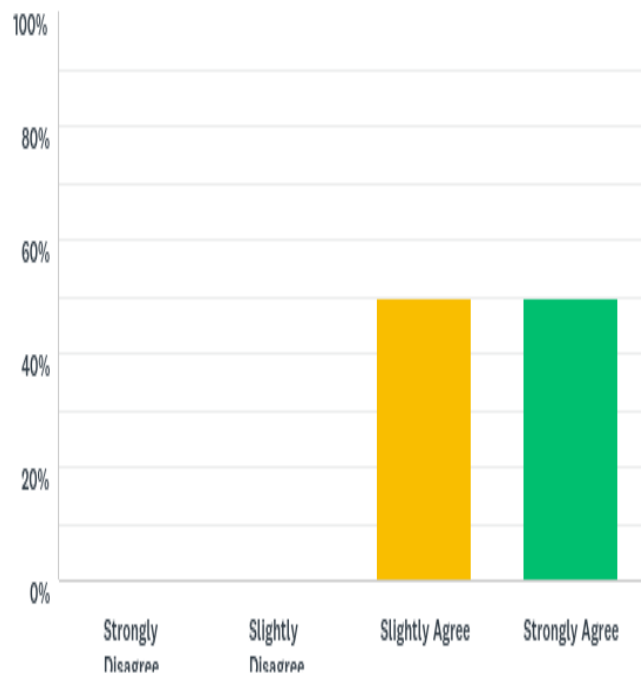
1. Not for profit and working towards (charitable) purpose
2. Accountability to members
3. Compliance with Australian laws
4. Suitability of responsible persons
5. Duties of responsible persons

# How do you ...

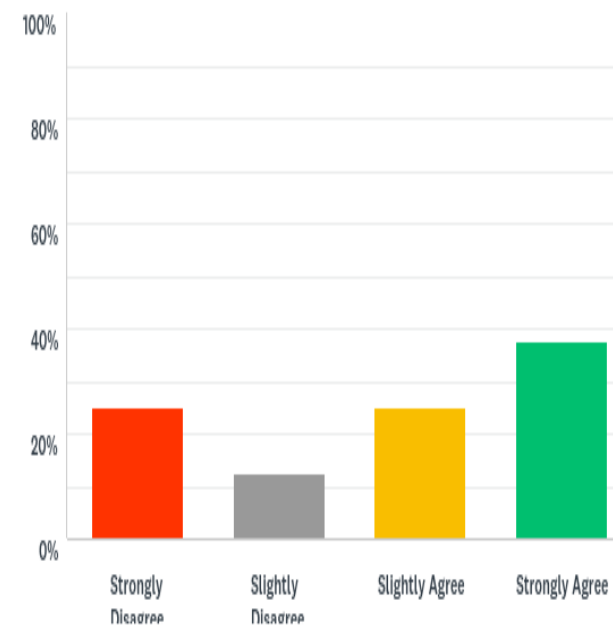
- ▶ Prove compliance ?
- ▶ Perform evaluation ?
- ▶ Provide development?

# Responses to question on compliance

Q13 I make diligent inquiry and am reasonably informed about legal compliance



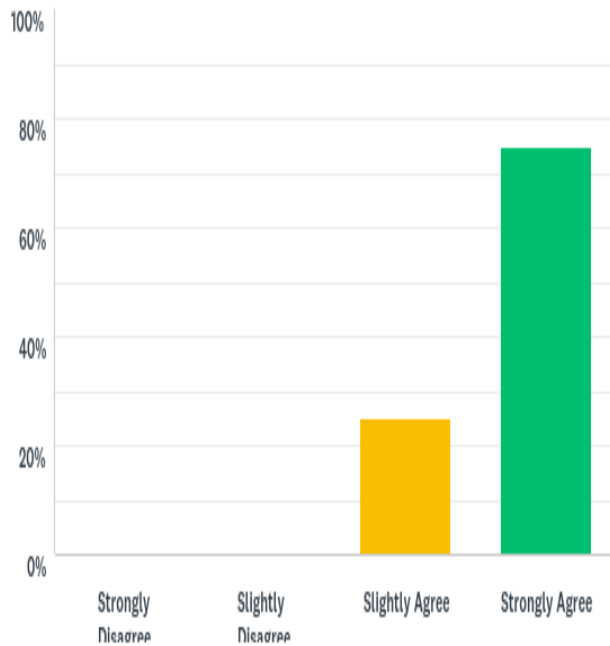
Q14 I believe all directors make diligent inquiry and are reasonably informed about legal compliance



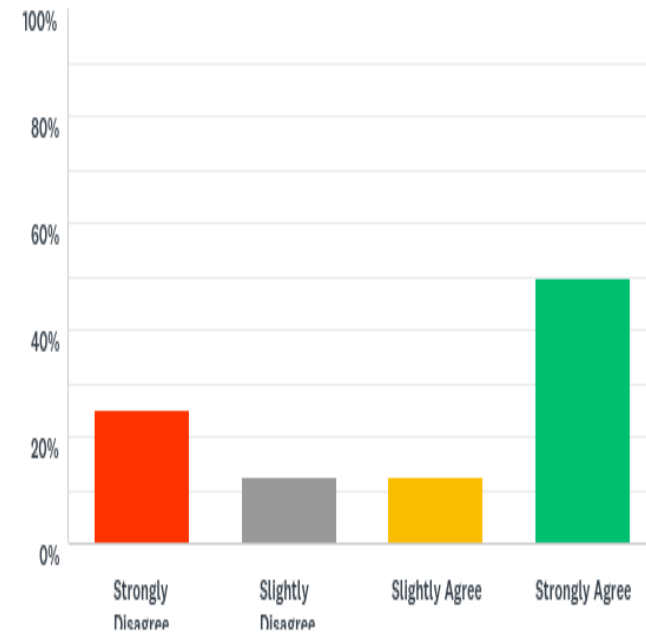


# Response to review questions on director duties

Q11 I understand the duty of the board to members

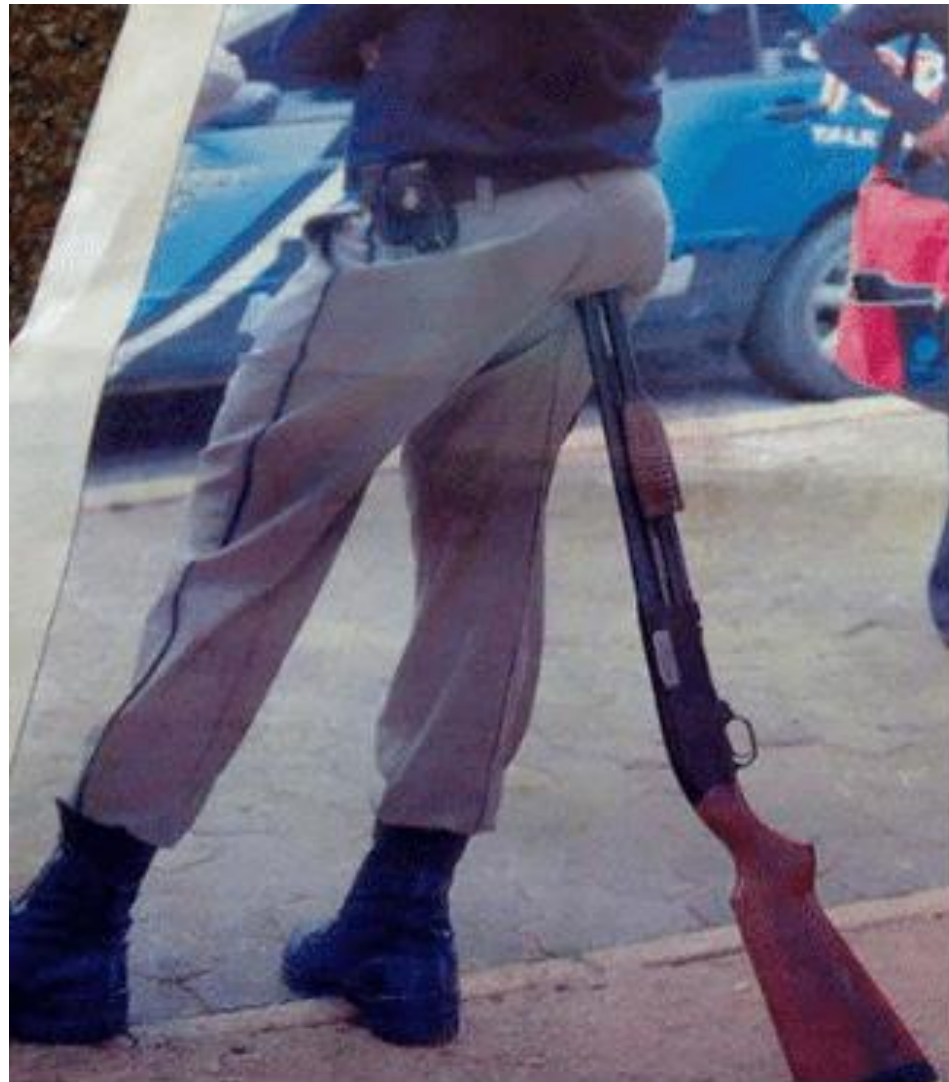


Q12 I believe all directors understand the duty of the board to members



# Important

- ▶ Review what is done
- ▶ Not what your policies say should be done



## Joburg's dumbest policeman?

PHOTO: Disbelief, disgust is the reaction

### ALICIA THORN

"THIS image should be used by the police force as their training manual as an example of how not to handle a firearm," said Dr Johan Burger of the Institute of Security Studies.

He and other members of various organisations have expressed their absolute disbelief, shock and disgust at a photograph captured by a photographer from The Citizen showing the handling of a shotgun by a Johannesburg Metro Police officer inside the University of Johannesburg on Thursday during a student protest.

Burger said the image was "one of the stupidest examples of gun handling I've seen in a long time", adding it showed a complete lack of understanding and training in the safe handling of a weapon.

"There definitely should be some kind of action taken against this officer - even if it's just a refresher course. This example demonstrates poor training, negligence and total recklessness and does not provide a good example, especially for civilians, on how to treat and respect firearms."

Burger added the liability for the officer and his employer were huge should the firearm have gone off.

"Even if the gun was made safe, mistakes can happen and people can be hurt or killed. Any well-trained person knows not to do such a thing," he said.

South African Gun Owners

### Snip

This city should be declared gun-free. This is a prime example of a lack of supervision, training, discipline.

These are the policemen to be police owners. Gun safe there are no variations.

Gun Free South Africa

Crowley said the serious concerns.

"The police force to build public such an example by an officer's defence built," she said.

Crowley said officers were gun legislation, not to be strictly controlled.

Johannesburg spokesman Cl

Wayne Minna displayed in

would "definitely

"Sitting on

tray to the

Having policies and standards is not enough!

# Decisions to make

- ▶ Scope of review (Governance, Board Performance, Compliance)
- ▶ 360, 180, just board (Stakeholders, Staff, Board)
- ▶ Period of review (Annual, Biennial, Triennial)
- ▶ Methodology (survey, desk review, interviews, workshop, self or externally facilitated)
- ▶ Outcomes (succession, development, processes)

## Using the ACNC Standards

What would you measure or investigate to ensure compliance with the standards?



# Governance Standard 1: Not-for-profit and working towards charitable purpose

Charities to be able to demonstrate that they:

- ▶ were set up as a not-for-profit with a charitable purpose
- ▶ run as a not-for-profit and work towards that charitable purpose, and
- ▶ provide information about their charitable purpose to the public.

# Governance standard 2: Accountability to members

Charities to:

- ▶ take reasonable steps to be accountable to their members
- ▶ allow their members adequate opportunities to raise concerns about how the charity is run.

Being accountable includes letting the members know about the charity's activities and what the results of those activities are. It also includes allowing members to raise concerns and ask questions.

# Governance Standard 3: Compliance with Australian Laws

Charities to not act in a way that, under Commonwealth, state or territory law, could be dealt with as:

- ▶ an indictable offence (being a serious crime that is generally tried by a judge and a jury), or
- ▶ a breach of law that has a civil (not criminal) penalty of 60 penalty units (currently \$12,600) or more.



# Governance standard 4: suitability of responsible persons

Charities to take reasonable steps to be satisfied that Responsible Persons are not disqualified from:

- ▶ managing a corporation under the Corporations Act 2001 (Cth) (the Corporations Act), or
- ▶ being a Responsible Person by the ACNC Commissioner, within the previous 12 months.
- ▶ If a charity is not satisfied, it must not appoint this person. If the person is already appointed, the charity must take reasonable steps to remove them as a Responsible Person.

Applies even if charity is not a company.

# Do you ask directors...

- ▶ To confirm their suitability?
- ▶ (and while you are at it to attend meetings, come prepared, pay attention, and comply with policies, standards, etc?)



# Governance standard 5: Duties of responsible persons

Charities to take reasonable steps to make sure that Responsible Persons:

- ▶ Act with reasonable care and diligence
- ▶ Act honestly and fairly in the best interests of the charity and for its charitable purposes
- ▶ Don't misuse their position or information they gain as a Responsible Person
- ▶ Disclose conflicts of interest
- ▶ Ensure that the financial affairs of the charity are managed responsibly, and
- ▶ Don't allow the charity to operate while it is insolvent.

Responsible Persons should act with standards of **integrity and common sense**

# Where do you experience problems?

- ▶ Most NFPs experience problems with standards 4 and/or 5
- ▶ This is not limited to the NFP sector

# NFP directors are at risk



**“I suppose I’ll be the one to mention the elephant in the room.”**

# Accountability

“Criminal offences for the breach of certain directors' duties will continue to apply under the Corporations Act. For example, section 184 of the Corporations Act still applies to the directors and other officers of companies that are charities registered with the ACNC and directors continue to have a duty to prevent insolvent trading”

ASIC Website, July 2019

# Accountability

"Many of ASIC's enforcement outcomes are criminal outcomes – nearly 70 per cent – but this is due to the high number of criminal outcomes obtained by ASIC's small business compliance and deterrence team"

Professor Ian Ramsey, University of Melbourne, in Companies and Securities Law Journal in November 2017.

# Going beyond the ACNC

- ▶ Standards do not mention director effectiveness
- ▶ Strategy and risk management are not covered
- ▶ Need to add some aspects of these for a 'performance' rather than 'compliance' review
- ▶ No benchmarking against other organisations



# Carver Model

Strategic Plan

Relationship with CEO

Delegations to CEO

Governance Processes

# Review behaviours

**The most incompetent board member is not one who asks questions about matters which, for their colleagues, are straightforward or clear. Rather, it is the director who chooses not to form his or her own judgment, but, instead, elects to vote with the majority. This happens too often.**

Ian Dunn

The Director's Dilemma, 2017

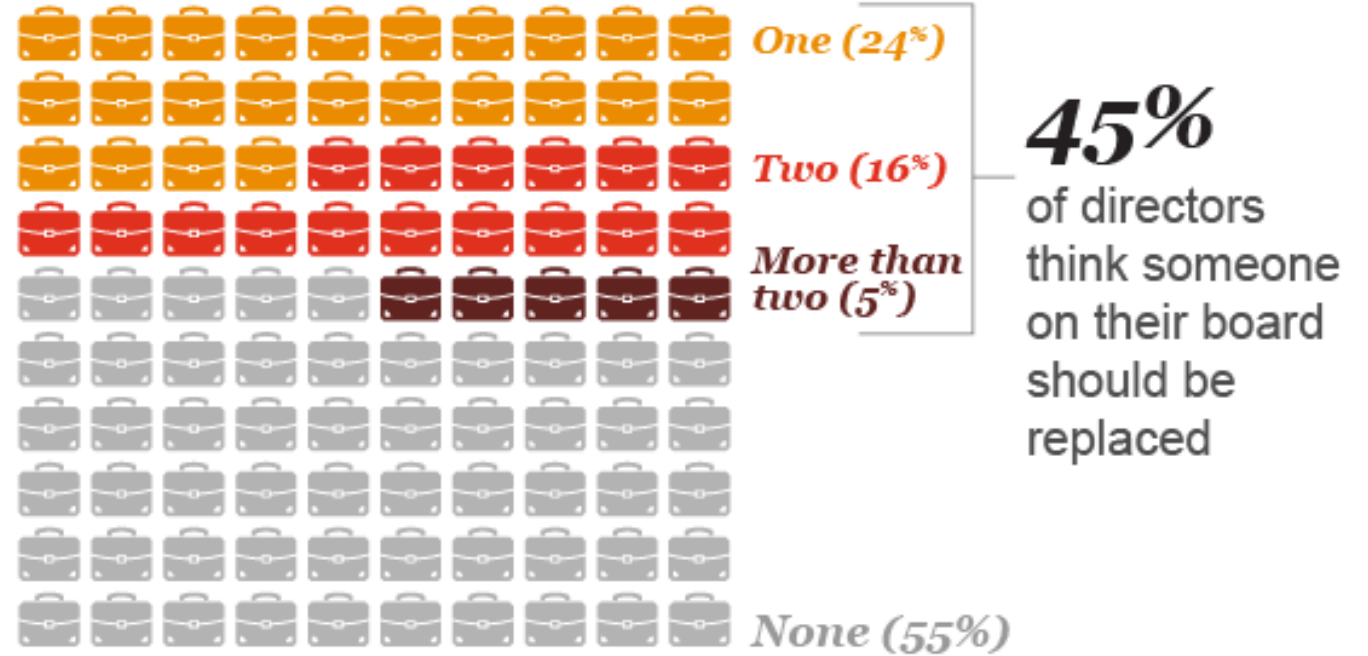
# Trends in board reviews

- ▶ PwC annual corporate directors survey
- ▶ NACD Blue Ribbon Commission on Board Evaluation



- ▶ 24% of directors say their board needs to replace a director
- ▶ 16% say their board needs to replace two directors
- ▶ 5% say their board needs to replace 3 or more directors
- ▶ Almost 50% had negative feedback about peers

## *Directors: Are you measuring up? Your fellow directors may not think so.*



Source: PwC, 2018 Annual Corporate Directors Survey, October 2018.  
Q. In your opinion, how many directors on your board should be replaced?  
Base: 700

# PwC specific concerns

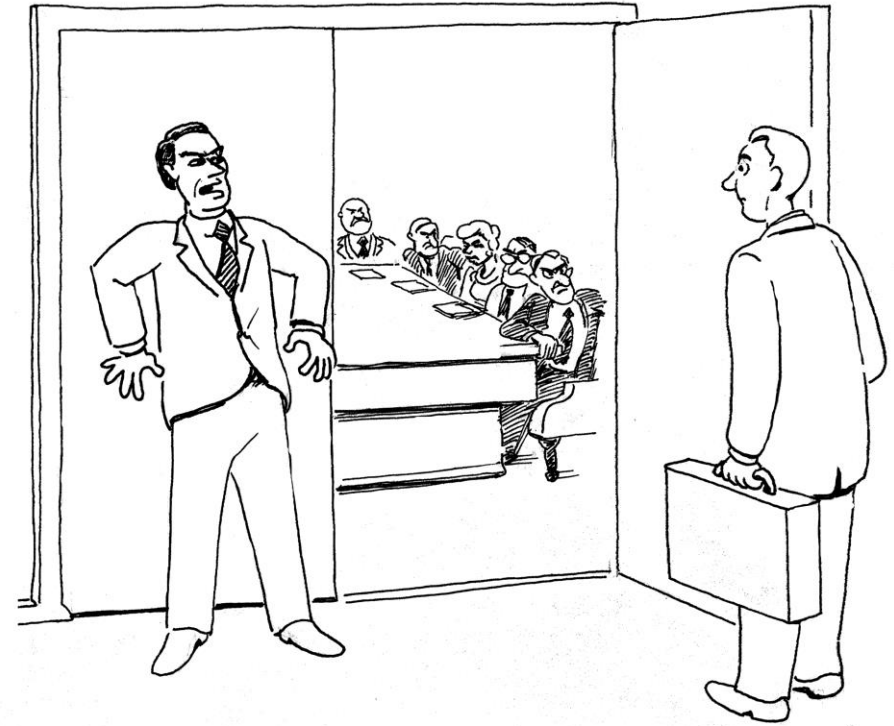
- ▶ 18% overstep boundaries of role
- ▶ 16% reluctant to challenge management
- ▶ 14% interaction style negatively impacts board dynamics
- ▶ 12% lacks appropriate skills or expertise
- ▶ 10% advanced age has diminished performance

# NACD

- ▶ For a successful evaluation, the board members must want to be evaluated in order to provide a higher level of guidance for the company.
- ▶ Boards need directors with the correct collection of expertise.
- ▶ Courage to do what is best for the company is among the most important of values in board members.
- ▶ A culture of "constructive interaction" is essential within the board.
- ▶ Evaluations must be approached with consideration of the corporate strategy.
- ▶ The correct evaluation process must be based upon established strategic goals.

# What else?

- ▶ Human dynamics are essential
- ▶ Boards need to be open to improve
- ▶ It is hard to be charitable when you feel criticised



“Remember, I’m behind you all the way.  
WAY behind you.”

# Questions?

**ALWAYS HAPPY TO HELP –  
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