



# Governing Body Legal Duties & Compliance Management

## THE ASK:

Governing bodies are responsible for the overall governance, management, and strategic direction of the organisation and for delivering accountable corporate performance that aligns with the provider's objectives. As a result, governing body members must understand their duties and compliance responsibilities across a wide range of areas.

## Covered in this Topic Guide

- Overview of the legal frameworks
- Duties of aged care providers
- Statutory duties
- Fiduciary duties
- Managing conflicts of interest
- Compliance management

## Where are we now?



*[Members should] take the opportunity to do board education...  
Each individual and then the whole board must understand their responsibilities.*

GOVERNING BOARD MEMBER

## Key concepts

The following high-level definitions are provided to assist in interpreting some of the key concepts discussed in this Topic Guide:

- A **fiduciary** is an entity that acts on behalf of another and in doing so has a clear legal or ethical relationship of trust to act in the best interests of the other party/parties.
- A **duty to act in good faith** requires governing body members to act honestly, fairly and loyally in furthering the best interests of the provider.
- **Conflicts of interest** arise where a governing body member is in a position where their own interests or someone else's interests (such as a friend or family member) clash with the interests of the provider or where the member may improperly benefit from their position on the governing body. This includes actual, potential and perceived conflicts of interest.
- A provider is **insolvent** if it is unable to pay its debts as and when they fall due.
- **Register of interests** is a record of all declarations of personal and professional interests, which should include details of material shareholdings, ownership of other entities and any other positions of influence.

## Governing body duties in aged care

The nature of the provision of aged care services requires the highest standards of accountability and performance to maintain the trust of stakeholders and ensure the longevity of the provider. In addition to general compliance requirements that apply, governing body members must seek to ensure the provider maintains approved provider status and (where applicable) is accredited and maintains that accreditation to provide government subsidised services.

### Story from the sector



#### Governing body members have a duty to disclose and manage any conflicts of interest that may arise

##### KEY TAKEAWAYS

- An updated register of interests is critical to compliance management.
- Governing bodies should frequently raise and discuss conflicts so that they can be managed appropriately.

Christopher is a governing body member of ACME Community Services. He is also a director of Road Runner Pty Ltd, a specialist employment agency that provides support workers to aged care providers.

Acme Community Services has a high support worker turnover and urgently requires agency workers to fill those vacant positions. ACME Community Services considers engaging 'Road Runner Pty Ltd' as their employment agency. Before engaging in contract negotiations with Road Runner Pty Ltd, the governing body checks the interests register and sees that Christopher has a declared interest in Road Runner Pty Ltd. This is an actual conflict of interest as it directly benefits Christopher's private interests.

At the next meeting, the chair of the governing body requests that Christopher absent himself from discussions relating to the decision on which employment agency to engage. The governing body decides that due to Christopher's conflict of interest, they will not engage Road Runner Pty Ltd.

The governing body records this discussion in the meeting minutes and reviews the conflicts register to ensure all conflicts and interests of governing body members are declared.

## Tips for understanding legal duties and compliance management

### Older Australians at the Centre of Care

- Governing body duties are to ensure the ongoing viability of the provider and that the provision of safe, high quality, consumer outcomes ultimately benefit the provider's performance.

### Obligations and Accountabilities

- Governing body members are fiduciaries and therefore owe fiduciary duties of trust and loyalty to the provider.
- Ensure the governing body understands that its obligations can

change depending on the entity type and operations of the provider.

### Knowledge, Skills and Experience

- Governing body members have a duty to act with due care, skill and diligence when making decisions.
- Understand and stay on top of individual obligations as well as obligations at the provider level.

### Leadership and Culture

- Encourage a culture of disclosure and frank discussion about any potential conflicts and how to manage them

## Reflecting on your practice



### Think...

Below are the top things you need to be **thinking** about:

- Obligations exist for individuals and providers under general laws and as accredited and Commonwealth Government subsidised aged care services.
- Governing body members are fiduciaries and have specific duties to act in the best interest of the provider, which includes ensuring the delivery of safe and high-quality aged care to consumers.
- Compliance with legal duties needs to be regularly monitored and updated.
- The actions of members of governing bodies reflect on the governing body and the provider.
- The provider's constitution or charter is important as it sets out the legal framework and decision-making powers within which it has been established.



## Ask and say...

Below are the top **questions you need to be asking**:

- Is the governing body able to show that it takes reasonable care, skill and diligence in its decision making?
- How are governing body members taking responsibility to ensure that they are acting in the best interest of the sustainable success of the provider?
- Does the governing body have a process for identifying and managing members conflicts of interest?
- Are governing body members fully aware of their responsibilities regarding solvency and financial reporting?
- Do governing body members have a good working understanding of the entity type, registrations, applicable laws and associated obligations?



## Do...

These are the top **actions and behaviours** of governing body members:

- Understand the provider's entity type and the range of compliance obligations associated with it at an individual and provider level.
- Encourage members to disclose any possible conflicts of interest early and encourage open and frank discussion to manage the conflicts.
- Understand that compliance management is an ongoing process.
- Stay up to date on legal and regulatory updates to obligations and responsibilities of governing body members.

## Overview of the legal frameworks

It is important that members of governing bodies have a working understanding of the obligations and responsibilities under the relevant legal frameworks. Set out below is the key aged care legislation that providers should be familiar with.



Aged Care Act 1997	Aged Care Quality and Safety Commission Act 2018	Aged Care Quality and Safety Commission Rules 2018
Accountability Principles 2014	Information Principles 2014	Quality of Care Principles 2014
Records Principles 2014	Sanctions Principles 2014	User Rights Principles 2014

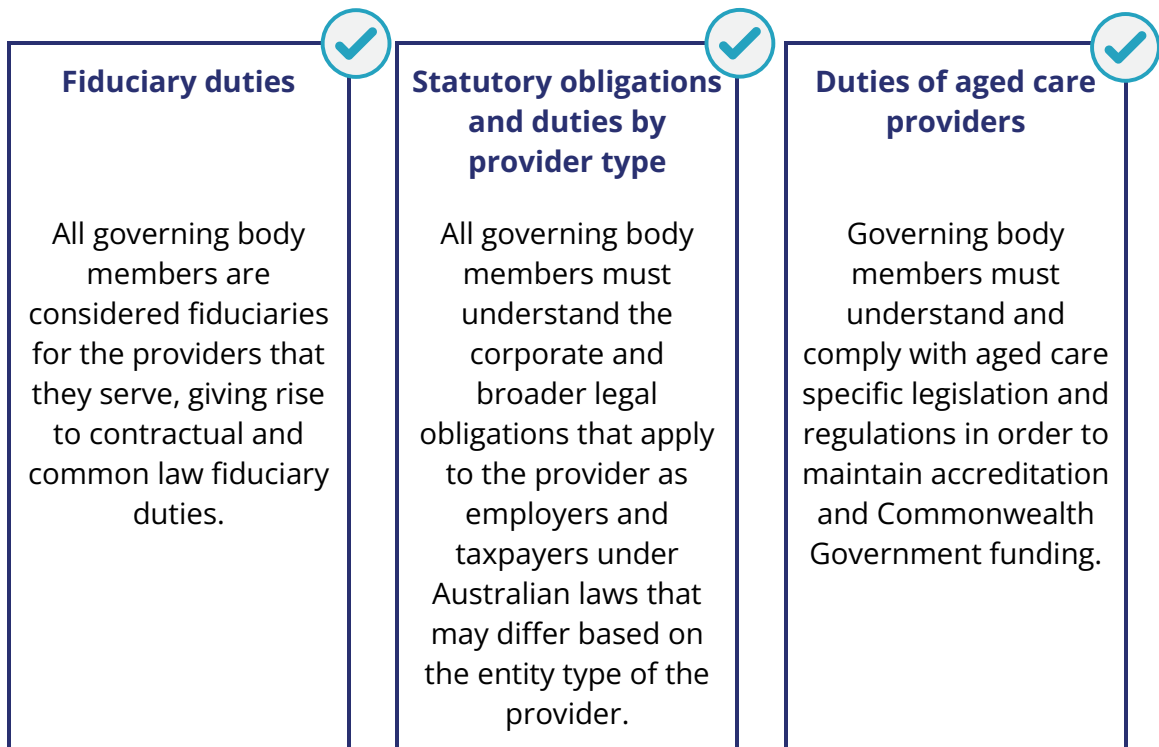
Members of governing bodies must also be aware of the broader laws that may apply as an individual or collectively, and any specific obligations that may apply based on the organisation type and structure. Set out below are some of the key federal legislations relevant to most aged care providers.



<p>Corporate governance</p> <p>Obligations as an Australian entity</p>	<p>Health and disability sector</p> <p>Obligations as a provider of health and disability services</p>	<p>Privacy, employment and discrimination</p> <p>Obligations as an employer</p>
<ul style="list-style-type: none"> <li>• Australian Charities and Not-for-profits Commission Act 2012</li> <li>• Charities Act 2013</li> <li>• Corporations Act 2001</li> <li>• ASX Listing Rules</li> <li>• ASX Principles</li> </ul>	<ul style="list-style-type: none"> <li>• National Disability Insurance Scheme Act 2013</li> <li>• National Safety and Quality Health Service Standards</li> <li>• My Health Records Act 2012</li> </ul>	<ul style="list-style-type: none"> <li>• Privacy Act 1988</li> <li>• Model Work Health and Safety Act 2019</li> <li>• Fair Work Act 2009</li> <li>• Racial and Discrimination Act 1975</li> <li>• Sex Discrimination Act 1984</li> <li>• Disability Discrimination Act 1992</li> <li>• Age Discrimination Act 2004</li> </ul>

## Navigating legal duties

Navigating the applicable legal duties can be challenging but is a key responsibility of governing body members. Broadly, these obligations can be considered in three categories:



It is important to note that governing body members of aged care providers have aged care specific duties and compliance requirements to be aware of. While the financial performance and sustainability of the provider is a key function of the governing body, the continuous improvement of service delivery and better consumer outcomes should be key drivers of decision making.



## Duties of aged care providers

Governing body members must take an active role in understanding the obligations of the aged care provider and what duties are imposed on them as the governing body. An understanding of clinical or operational legal requirements are fundamental to the ability of the governing body to make effective decisions for the provider. Such requirements include:



- An obligation to minimise the use of restrictive practices (see Quality of Care Principles 2014).
- A responsibility for providers of residential aged care to understand and comply with the prudential standards (see Fees and Payments Principles 2014).
- Understanding reportable incident requirements under the Serious Incident Response Scheme Age Care Legislation Amendment: (Serious Incident Scheme and other measures) Bill 2020.
- Understanding reporting obligations under the National Age Care Mandatory Quality Indicator Program.

## Key obligations and responsibilities

The following table highlights some of the key obligations and responsibilities that governing bodies of aged care providers need to be aware of to fulfil their duties.

Duty	Regulation	Key obligations
<b>Prepare financial reports in approved form</b>	<ul style="list-style-type: none"> <li>Accountability Principles 2014 (part 4)</li> </ul>	<ul style="list-style-type: none"> <li>The financial reports of aged care providers must be in a form approved by the Secretary and must meet the requirements under the Aged Care Act 1997.</li> <li>Financial reports must be provided to the Secretary within 4 months of the end of the financial year.</li> <li>Audited financial reports must be provided to consumers upon request.</li> </ul>
<b>Notification of circumstances materially affecting suitability to provide aged care</b>	<ul style="list-style-type: none"> <li>Aged Care Act 1997 (section 9-1)</li> </ul>	<ul style="list-style-type: none"> <li>Providers are required to notify the Aged Care Safety and Quality Commissioner of changes that materially affect the suitability of an approved provider to provide aged care within 28 days after the change occurs. Such changes include change to entity type, the provider is unable to manage its financial responsibilities, or makes substantial changes to its organisational or governance structure.</li> </ul>
<b>Ensure suitability of key personnel</b>	<ul style="list-style-type: none"> <li>Accountability Principles 2014 (part 7A)</li> </ul>	<ul style="list-style-type: none"> <li>Reasonable steps must be taken to ensure that key personnel of aged care providers (including governing body members) are suitable and are not disqualified individuals.</li> </ul>
<b>Ensure suitability of staff and volunteers</b>	<ul style="list-style-type: none"> <li>Accountability Principles 2014 (part 6)</li> </ul>	<ul style="list-style-type: none"> <li>The governing body must ensure that all staff or volunteers have satisfied the screening requirements applicable as an approved provider.</li> </ul>
<b>Maintaining quality of care and provider accreditation</b>	<ul style="list-style-type: none"> <li>Quality of Care Principles 2014 (Schedule 2 – Accreditation Standards)</li> </ul>	<ul style="list-style-type: none"> <li>Approved provider status relies on compliance with Aged Care Act 1997 and subordinate legislation, including the Aged Care Quality Standards.</li> </ul>

## Preparing for reforms in aged care

One of the pillars of reform as part of the Australian Government’s aged care reform agenda is governance, in particular strengthening provider governance. Measures for reform have been introduced to support providers to improve their governance arrangements and meet new strengthened legislative obligations.

## Statutory duties

### Duties by provider type

Set out below is a non-exhaustive list of some of the duties that will apply to different providers, based on their corporate structure.

Entity Type	Regulation	Key obligations
<b>Listed companies</b>	<ul style="list-style-type: none"> <li>• Corporations Act 2001</li> <li>• ASX Listing Rules</li> <li>• ASX Corporate Governance Principles and Recommendations</li> </ul>	<ul style="list-style-type: none"> <li>• Continuous disclosure obligations require governing bodies to disclose to the ASX any information that may have a material effect on the price or value of a listed entity's securities or the entity itself.</li> <li>• Reporting obligations on the basis of 'if not, why not' principle, the onus being on governing body members to explain why the ASX corporate governance guidance was not adopted by the entity.</li> </ul>
<b>Indigenous Corporation</b>	<ul style="list-style-type: none"> <li>• Corporations (Aboriginal and Torres Strait Islander) Act 2006</li> </ul>	<ul style="list-style-type: none"> <li>• Aboriginal and Torres Strait Islander groups that form registered corporations are required to have a majority of members on the governing body to be Aboriginal and Torres Strait Islander people.</li> <li>• Corporations are required to have a rule book to set out its aims, dispute resolution processes and member requirements.</li> </ul>
<b>Not-for-profit or Charitable</b>	<ul style="list-style-type: none"> <li>• Australian Charities and Not-for-profits Commission Act 2012</li> <li>• Charities Act 2013</li> </ul>	<ul style="list-style-type: none"> <li>• Responsible persons of not-for-profit providers must comply with the Australian Charities and Not-for-profits Commission (ACNC) Governance Standards (see Governance Standard 5).</li> <li>• Providers registered with the ACNC must notify the ACNC of its responsible persons (being the governing body members).</li> </ul>
<b>Faith based</b>	<ul style="list-style-type: none"> <li>• Church establishing legislation</li> </ul>	<ul style="list-style-type: none"> <li>• Establishing legislation may set out an explicit mission and that the religious foundation must inform strategic intent and board composition.</li> </ul>
<b>Incorporated Associations</b>	<ul style="list-style-type: none"> <li>• State based enabling legislation</li> </ul>	<ul style="list-style-type: none"> <li>• State legislation will set out the requirements for the registration and management of incorporated associations, including the structure and powers of the governing body.</li> </ul>

## Duties by nature of operations

There are additional statutory duties that will apply to aged care providers based on the nature of its operations.

Operation	Regulation	Key obligations
<b>Use of personal information and data breaches</b>	<ul style="list-style-type: none"> <li>• Privacy Act 1988</li> <li>• Notifiable Data Breaches scheme</li> </ul>	<ul style="list-style-type: none"> <li>• Providers can only use or disclosure personal information for the primary purpose that it was collected.</li> <li>• Providers must take reasonable security measures to protect personal information it holds.</li> <li>• Eligible data breaches must be reported to the Office of Australian Information Commissioner.</li> </ul>
<b>Using My Health Record for consumer records</b>	<ul style="list-style-type: none"> <li>• My Health Records Act 2012</li> </ul>	<ul style="list-style-type: none"> <li>• Registered entities can collect, use and disclose information in the My Health Records for proper purposes.</li> </ul>
<b>Employee entitlements and safe working conditions</b>	<ul style="list-style-type: none"> <li>• Fair Work Act 2009</li> </ul>	<ul style="list-style-type: none"> <li>• Providers must provide where appropriate for flexible working arrangements, fairness at work, provide employee entitlements and prevent discrimination in the workplace.</li> </ul>
<b>Providing National Disability Insurance Scheme (NDIS) supports</b>	<ul style="list-style-type: none"> <li>• National Disability Insurance Scheme Act 2013</li> </ul>	<ul style="list-style-type: none"> <li>• Key personnel of a registered NDIS provider must satisfy the suitability assessment to deliver NDIS supports and services, which considers whether the member has been a previously registered NDIS provider, is subject to a banning order, has past convictions, been insolvent, is subject to enforcement action or to findings in relation to fraud, misrepresentation or dishonesty or otherwise been disqualified from managing corporations.</li> </ul>

## Fiduciary duties

Fiduciary duties are preventive measures to ensure trust reposed in the governing body member is not overcome by the temptation of the governing body member's self-interest. These duties can arise in legislation, common law and contractually:

- **A duty to act in good faith in the best interests of the provider and for a proper purpose**

Act honestly, fairly and loyally in making decisions for the benefit of the provider.

- **Duty to act with due care, skill and diligence**

Keep up to date with developments in the aged care sector, ask for more information if needed to make a decision or seek out skills or professional advice when necessary.

- **A duty to avoid and manage conflicts of interest**

Identify and manage any actual, potential or perceived conflicts as they arise.

- **A duty not to misuse information obtained as a governing body member**

Do not use commercially sensitive information shared at governing body meetings with third parties or for personal advantage.

- **A duty to prevent the provider from trading while insolvent**

Stay informed about the financial position of the provider and take reasonable steps to prevent the provider from incurring further debt until it is able to pay any outstanding debts.

- **A duty of skill, competence and diligence in the understanding of the financial report**

Take time to understand the financial report and how the finances impact on operations and clinical care.

## Managing conflicts of interest

One key, common duty that governing body members have is managing possible conflicts of interest. If a member realises they have a conflict of interest, whether actual, potential or perceived, they must disclose that interest to the governing body as soon as possible and avoid taking part in governing body decisions or discussions that relate to the conflict of interest. It may be possible in some circumstances to still participate in a decision where all of the other members are aware of the conflict and agree the member can still participate. The important thing is that conflicts are identified and appropriately managed.

The provider should have a policy in place that ensures the governing body members disclose any actual or perceived conflicts to enable the provider to be able to identify and manage them effectively. To manage any such conflicts:

- New governing body members should complete a declaration of interests on appointment.
- Ensure that all personal and professional interests are maintained and regularly updated in a register of conflicts.
- Declarations of interest should be a standing agenda item at meetings so that members are encouraged to regularly discuss, disclose and manage conflict of interest issues.

## Maintaining a register of interests

All providers should have a register of personal and professional interests that is updated regularly. The register should include details of material shareholdings or ownership of outside entities, as well as any other positions of influence. Examples include:

### Financial interests

- Major share investments
- Small business owner or partner
- Close family member (e.g. spouse) has one of these financial interests

### Positions of influence

- Director of other entity
- Local community leader/office holder
- Close family members (e.g. spouse) holds one of these roles
- Senior employee of outside provider
- Government official or decision maker

## Compliance management

Compliance with legal duties is an ongoing and constant process that should be at the forefront of members minds when discharging their duties. Compliance management refers to the procedures put in place to monitor and assess risks and compliance with relevant laws, regulations and requirements.

Governing bodies must take an active role in ensuring there are appropriate systems in place to oversee, measure and monitor compliance against the provider's legal obligations, including the governing body's legal duties. In addition to a conflicts register, there are a range of systems and tools available to providers that governing bodies can leverage for ongoing compliance management, such as:

- Development of compliance obligation registers and regular reporting to the governing body regarding any material breaches or changes to regulatory requirements.
- Implementation of internal audit or assurance programs.
- Monitoring of policies and processes to ensure that they meet compliance requirements.
- Periodic reviews or deep dives into specific obligations to strengthen and enhance policies and processes.

## Useful tools

- Tool - [Compliance Register](#)

## Useful references and links

[Accountability Principles 2014](#)

[ASX Listing Rules](#)

[ASX Corporate Governance Principles and Recommendations](#)