

# A Fish Rots from the Head

LASA NATIONAL CONGRESS

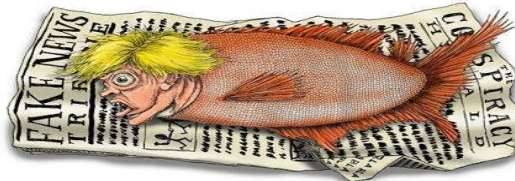
29 OCTOBER 2018

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# A fish rots from the head

- Turkish proverb used as a metaphor and not in a literal sense
- It's 1768 meaning was that if the servant is disorderly, it is because the master is so
- Piscine biology confirms that a fish in fact rots and stinks from its guts before the head

Sir James Porter's *Observations on the religion, law government and manners of the Turks*, 1768



The fish rots from the head first.

# Objectives

- Paradigm Shift
- Transformation
- Royal Commission
- Case Law
- Accountability
- Summary

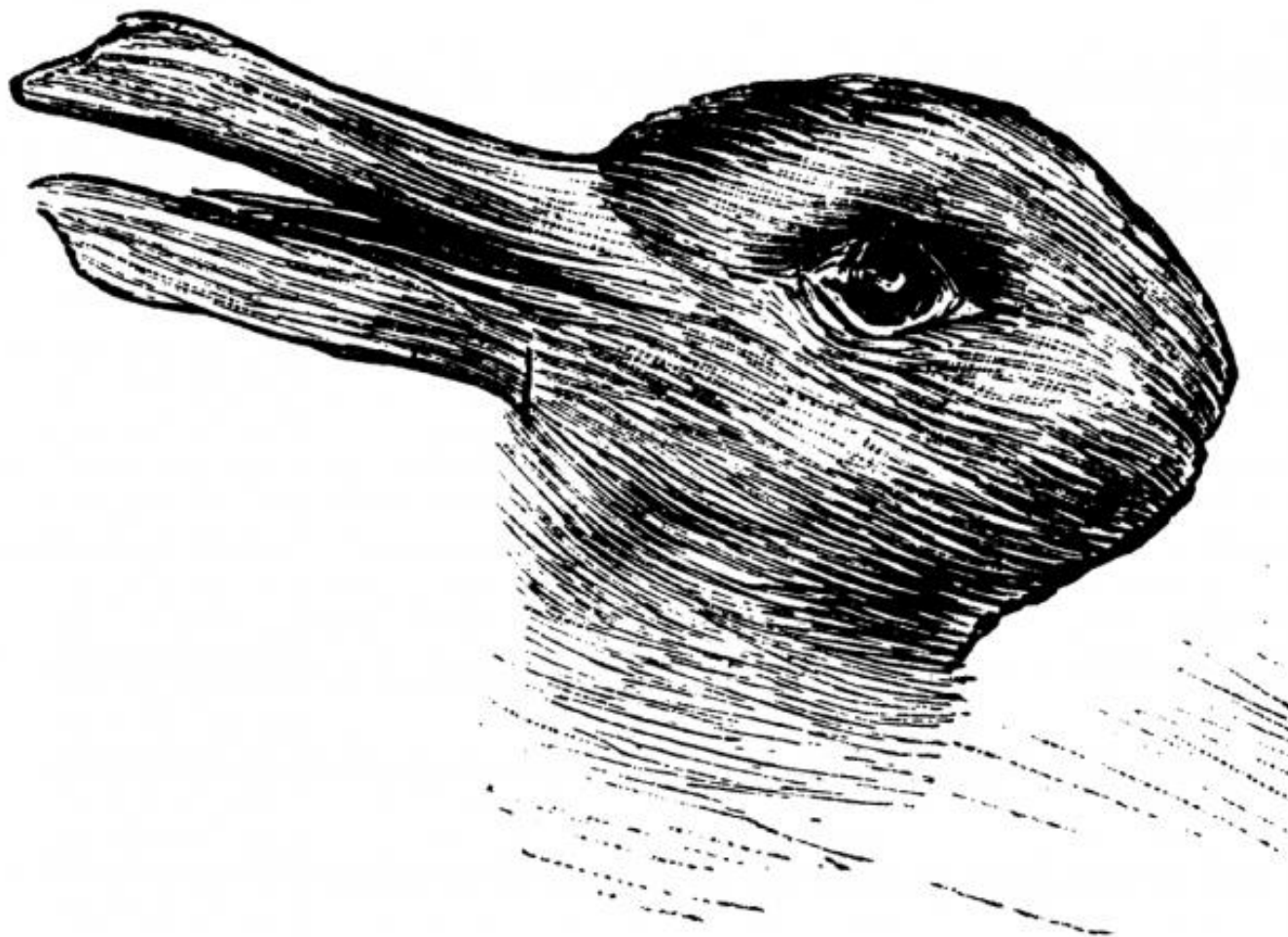
**Does Aged Care look like it did 10 years ago?**

**Does aged care look like it will in 10 years time?**

OH WOW!  
PARADIGM SHIFT!







# Paradigm Shift

- Fundamental change in an individual's or a society's view of how things work in the world
- It is not an evolutionary process its more transformational
- The paradigm we use is based on what we perceive to be true and accurate

- Standard 1
  - Management systems, staffing and organisational development

No mention of governance

Responsibility appears to rest with management

Does not expressly consider Boards



# Single Quality Framework

- Standard 8 Organisational Governance

## Consumer Statement

I am confident the organisation is well run.

I can partner in improving the delivery of care and services

## Organisation Statement

The **organisation's governing body** is **accountable** for the delivery of safe and quality care and services.

# Standard 8 – Organisational Governance

- Requirements – demonstrate the following (not exclusive)
  - Consumers are engaged and supported in their engagement
  - Governing body promotes a culture and is **accountable** for their delivery.
  - Governance systems
    - Workforce governance, including the assignment of clear responsibilities and accountabilities.
  - Clinical governance framework including
    - Antimicrobial stewardship
    - Minimising the use of restraint
    - Open disclosure
  - Effective risk management systems
    - **Identifying** and **responding** to abuse and neglect of consumers

# Royal Commission into Aged Care Quality and Safety

Letters Patent

Terms of Reference

AND, to have regard to the following matters:

- (i) All aspects of the quality and safety of aged care services including but not limited to:
  - (x) systems to ensure that high quality care is delivered, such as governance arrangements and management support systems

# Aged Care Boards

- Only really emerged in the private space relatively recently
- Some boards of management came about through community services and consolidation
- Corporatisation of aged care services has identified the need for sophisticated governance structures

# Corporate Meltdowns

- The blame has generally been placed on the Board
- Where the CEO is blamed, the board has been considered either asleep or incompetent
- Not only providing strategic direction through effective governance but also managing a social system

- ASIC v Healey (2011)

2007 Financial Reports

Centro Properties Group (CNP)

Centro Retail Group (CER)

CNP failed to disclose \$1.5b of short term liabilities  
(by classifying them as non current liabilities)

CER failed to disclose \$500m (classified as NCL)

Not picked up by management or external auditors



- Judgment

Each director should have been aware of the accounting principles

They were entitled to delegate the preparation to others but cannot rely absolutely on others

Directors failed to see 'obvious errors'

# JAMES HARDIE CASES

- ASIC v MacDonald (No. 11) (2009) and appeals
  - Morley & Ors v ASIC
  - ASIC v Hellicar & Ors (2012)
  - Gillfillam v ASIC (2012)

## Summary

Asbestos related liabilities

Fund for compensation was established

Board approved the announcement to ASX on the quantum of the fund

Announcement contained misleading information

Board Minutes reflected approval of the announcement

## Lessons learnt from the James Hardie Cases

- Strategic decisions and announcements must be cleared by the board
- NED must be aware of all information available to them
- Cannot abrogate by delegation to others, even experts
- If your attending by teleconference or video be aware
- Review all draft minutes
- Raise any concerns

# Park Lane Assets Pty Ltd

- Supported Residential Service in Victoria
- ASIC investigation into a former director
- Breach of fiduciary duties
- Criminal charges of fraud which attracts a maximum penalty of 10 years imprisonment
- Case due to be heard in November 2018

# Easy RPL Pty Ltd

- Director signed an ASIC form asserting that there were no proceedings against it
- In fact there was a proceeding against the company in VCAT
- Director signing the document was fined \$350 and placed on a twelve month good behaviour bond
- Oversight tarnishes the reputation of the director

# Accountability

- Reputational – personal and/or professional
- Civil - \$200K / Compensation / prohibited from managing
- Criminal - \$200K up to 5 years imprisonment or both
- Professional Authorities e.g. AHPRA
- Personal Liability – losses caused by a breach



# An investigation report

“Trust is the currency of the (service) and improper conduct that undermines confidence or causes harm to customers devalues that currency”

“...management of its non financial risks (that is, its operational, compliance and conduct risks). These risks were neither clearly understood nor owned, the frameworks for managing them were cumbersome and incomplete...”

# An investigation report

- One of the greatest vulnerabilities was the inability of the board to “hear” the “voice of risk” particularly for “non-financial risk”
- The other was the voice of the customer. This affected decision making and service design

# An investigation report

- Identify a number of tell tale markers
  - Inadequate oversight and challenge by the board and its gatekeeper committees of emerging non-financial risks
  - Unclear accountabilities, starting with a lack of ownership at the Executive level
  - Weakness in how issues, incidents and risks were identified and escalated and a lack of urgency in their management and resolution
  - Overly complex and bureaucratic processes
  - An **operational RM framework** that worked better on paper than in practice

# An investigation report

- Prudential inquiry into the Commonwealth Bank of Australia
- April 2018
- APRA
- Panel –
  - Jillian Broadbent AO
  - Dr John Laker AO
  - Professor Graeme Samuel AC

35% of CEOs do not believe their boards understand the business or value the complexity of the business

**Survey by the Yale School of Management reported in the Harvard Business Review**

# Take Away

- The skills of the people on the board should reflect your strategy
- Tenure should be limited
- Turnover should be staggered
- Every board should have internal and external reviews
- Your board should not fear crossing the operational line when required
- The board must be inward looking and outward facing
- Your board should be able to debate issues confidently
- Beware of group think
- Use technology to boost your expertise if required



QUESTIONS?

# Disclaimer

The information contained in this presentation is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on the topics or areas discussed, please contact Sabine Phillips directly.

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