



**A PRACTICAL GUIDE FOR  
BOARD MEMBERS OF ARTS ORGANISATIONS**



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The Arts Council/An Chomhairle Ealaíon

70 Merrion Square,  
Dublin 2, Ireland

70 Cearnóg Mhuirfean,  
Baile Átha Cliath 2, Éire

Document also available in pdf format on Arts Council website

t +353 1 6180 200

f +353 1 6761 302

Callsave 1850 392492

e [info@artscouncil.ie](mailto:info@artscouncil.ie)

w [www.artscouncil.ie](http://www.artscouncil.ie)

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## USEFUL WEBSITES

Charities Regulation  
Department of Community Rural and Gaeltacht Affairs  
[www.pobail.ie](http://www.pobail.ie)

Boardmatch Ireland  
[www.boardmatchireland.ie](http://www.boardmatchireland.ie)

The IoD for Corporate Governance at UCD  
[www.ucd.ie/corpgov/](http://www.ucd.ie/corpgov/)

Business2Arts  
[www.business2arts.ie](http://www.business2arts.ie)

Arts and Business  
[www.aandb.org.uk](http://www.aandb.org.uk)

The Wheel  
[www.wheel.ie](http://www.wheel.ie)

Companies Registration Office  
[www.cro.ie](http://www.cro.ie)

Office of the Director of Corporate Enforcement  
[www.odce.ie](http://www.odce.ie)



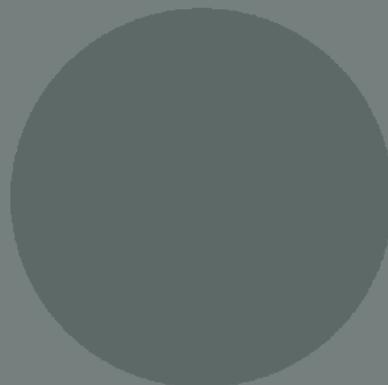
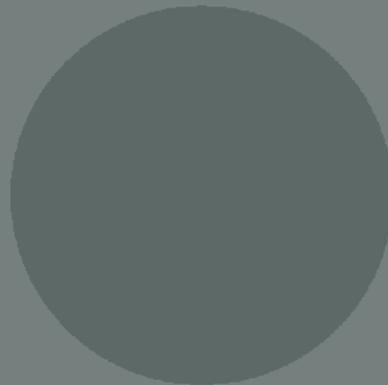
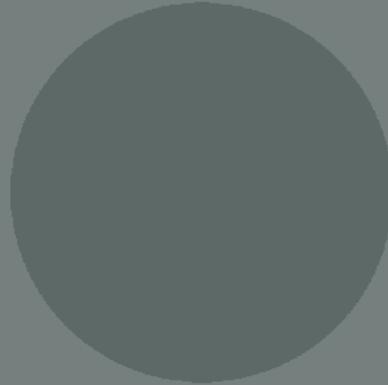
## **ACKNOWLEDGEMENTS**

Linda Scales is a solicitor, practising and lecturing in copyright and other aspects of media law. She was a board member and chairperson of Temple Bar Gallery & Studios in the period 1990 – 1999.

We are grateful to Professor Niamh Brennan, Academic Director of the Institute of Directors, Centre for Corporate Governance at UCD for her comments on an earlier draft of this publication.

## **DISCLAIMER**

While every care has been taken in the preparation of the information provided in this publication, it does not constitute any legal or other professional advice and the Arts Council advises readers to seek specific advice in relation to any decision or course of action.



## FOREWORD

I am delighted to present this publication, intended to support board members of arts organisations. It is the latest in a series of publications commissioned by the Arts Council to inform and develop effective board leadership within the arts sector.

Arts organisations are not businesses, but increasingly it is necessary for them to behave in a business-like way. Two factors are critical to an arts organisation's ability to succeed in its mission: how it is structured and how well it is run. Although the prevalent trend is to be established as a company, artistic ventures often begin as informal or voluntary groups, and remain as such for a long time. Groups not structured as companies tend to call their governing bodies 'boards'. This publication is intended for all arts bodies, irrespective of the way they are structured. However, as so many select to incorporate as companies, the publication addresses in some detail the position of board members as company directors.

Arts boards are typically made up of artists and business people. Members are usually people of considerable expertise in their own right, and may be strongly committed to the *raison d'être* of the organisation. However, they may not have had previous experience as board members of an arts organisation. While appropriate information, training and support may be sought, it is not often readily available. It is hoped that this publication will help fill this gap.

I would like to thank Linda Scales on an excellent document.

The publication is available in downloadable format on the Arts Council's website [www.artscouncil.ie](http://www.artscouncil.ie). Other titles available from the Arts Council in this area are *The Role and Responsibility of the Chief Executive* and *Financial Procedures: An Overview for Managers of Arts Venues*.



Mary Cloake  
Director  
July 2006

## GLOSSARY

<b>Annual General Meeting (AGM):</b>	Every company is obliged by law to hold a meeting of its members at least once a year at which certain business is transacted, including the presentation of the company accounts by the directors to the members.
<b>Annual Returns:</b>	Companies must submit certain information annually to the Companies Registration Office, on a pre-printed form supplied by the Companies Registration Office (called the 'Annual Return'). The audited accounts and certain other documents must accompany the form.
<b>Articles of Association:</b>	The Articles of Association of a company are the rules relating to the running of the company, by which every member and director agrees to be bound. They are prepared when the company is being incorporated, and are lodged in the Companies Registration Office. The Companies Act 1963 provides some standard sets of Articles, but it is prudent to tailor these to the specific needs of the company.
<b>Audit:</b>	A detailed examination of the financial records of an organisation for a specific period of time, carried out by a qualified auditor.
<b>Board:</b>	The directors of a company when referred to collectively.
<b>Chief Executive Officer (CEO):</b>	A person appointed by the Board to attend to the day-to-day management of the organisation.
<b>Charity:</b>	The word 'charity' has a somewhat imprecise legal meaning, centering on philanthropic purposes, which may be fulfilled by some arts organisations. In addition, a small number of arts bodies are specifically constituted as Charitable Trusts.
<b>Charitable Status:</b>	Organisations that are accorded 'charitable status' by the Revenue Commissioners are entitled to exemption from certain taxes. It is not necessary for an organisation to be a charity or a Charitable Trust in order to qualify for charitable status. The Revenue Commissioners have their own criteria by which they assess entitlement. Many arts bodies enjoy charitable status, without being 'charities' for any other purpose.
<b>Company Limited by Guarantee without a Share Capital:</b>	The most common form of legal structure used by not-for-profit organisations. Such companies have members instead of shareholders, who guarantee that in the event that the company is wound up, they will each contribute a specified (usually nominal) sum towards the debts of the company.

<b>Companies Registration Office:</b>	The office at which companies are registered and company documents are filed. Its address is 14 Parnell Square, Dublin 1, and its website address is <a href="http://www.cro.ie">www.cro.ie</a>
<b>Director:</b>	Historically, arts organisations tended to call their chief executive officer, 'the director'. The practice has been dropped in many organisations because it causes confusion where the organisation is a company with a board of directors. In this publication the chief executive is referred to as the CEO, and the word 'director' refers to a member of the board of directors.
<b>Extraordinary General Meeting (EGM):</b>	A meeting of the members of a company, usually called to deal with urgent business, which requires a decision of the members and which cannot wait until the next AGM.
<b>Governance:</b>	In general terms, a word that describes the role of the board of a company, and implies the authority to direct the business of the organisation and to delegate to management. 'Governance' is contrasted with 'management', which describes the role of the executive (see <b>CHAPTER 6</b> ).
<b>Limited Liability:</b>	One of the advantages of a company structure is that it confers limited liability on its members and directors. This means that they are not personally liable for the acts of the company. Limited liability is not, however, an absolute exemption from liability in all circumstances. Its benefits can be withdrawn in the event of certain types of wrongdoing.
<b>Member:</b>	Every 'guarantee company' has both members and directors, whose roles are essentially different, although they can be played by the same people. The members of a company are its stakeholders – usually the people who establish the company and their successors. They are accorded certain fundamental rights by company law, including the right to control the Memorandum and Articles of Association. They usually delegate governance of the organisation to the board of directors, and meet just once a year at the AGM, at which they receive the report of the directors and the audited accounts, and elect new directors to fill any vacant positions, and re-appoint the external auditors.
<b>Memorandum of Association:</b>	The Memorandum and Articles of Association of a company are collectively known as its constitution. While the Articles lay down the rules for the internal regulation of the company, the Memorandum can be seen as the

mission statement of the company. It sets out in some detail the objectives of the company. It also states the basis on which the company legally engages with the outside world, i.e., on the basis of limited liability. The Memorandum is drafted at the time of incorporation of the company and must be filed in the Companies Registration Office as a prerequisite to incorporation.

**Not-for-profit Company:**

A company that is prohibited from distributing profit amongst its members or shareholders, and instead must reinvest it in the company.

**Officer of a Company:**

Sometimes the directors and secretary of a company are collectively referred to as the 'officers' of the company. The Companies Act 1963 defines 'officer' as including a director or secretary.

**Stakeholder:**

At law, the members of a guarantee company are said to be its stakeholders, being the persons who established the organisation (and their successors) and who in this capacity have a vested interest in the success of the enterprise. The word can, however, be used in a wider sense, to refer to all of those who have invested in some way in the organisation. This would include the Arts Council, where it funds an organisation, as well as others who provide grant-aid or donations, employees of the company, creditors, the general public, etc.

**Statutory Duties:**

Company directors have two sets of duties to perform: general common law duties of proper behaviour towards the company and those who deal with the company and statutory duties. Statutory duties relate to the administration of the company, the keeping and filing of records with the Companies Registration Office and so forth. They are very specific and must be strictly observed.

**Solvent:**

Being in a position to pay debts, as they fall due for payment.





## CHAPTER 1 LEGAL STRUCTURE

### ADVANTAGES OF A FORMAL STRUCTURE

When people come together to pursue a common goal, they often order their affairs in a very informal way. Arts organisations often begin in this way. Definitions of purpose and rules about procedure may seem unnecessary, even undesirable.

However, without some formality about objectives and procedures, central issues about policy and decision-making tend to be neglected. Any lack of clarity will almost certainly at some point become a problem, generating the potential for internal conflict. Moreover, as an organisation grows and transactions become more complex, members may become concerned about their personal responsibility for its activities. The knowledge that certain legal forms provide limited liability is often what drives a group to seek a *formal structure*.

The advantages of a *formal structure* include that it:

- Articulates the values and objectives of the organisation;
- Provides rules for decision-making and internal management;
- Facilitates transactions between the organisation and others;
- Provides continuity when the founder members retire;
- May, depending on the structure chosen, provide members with limited liability.

### IDEAS ABOUT STRUCTURE

When a group decides to adopt a *formal structure*, some members may favour a particular concept. They may wish to form an association or a co-operative or a company. Often what lies behind the preference is an idea or an aspiration, rather than a definite wish for a particular legal form. There may be an assumption that a company structure is not appropriate because of its strong commercial associations. On the other hand, there may be a leaning towards company structure because members are familiar with it. For some, the idea of a co-operative may appear the most desirable option for a group of equals with a common non-profit-making goal. For others, the words 'company' and 'co-operative' may carry baggage, while 'association' feels happily neutral.

In fact, none of these words necessarily signals the type of *legal structure* that will best express the members' ideas. For this reason, it is important to establish what lies behind those ideas. Some shared beliefs may emerge that will not only be relevant to the choice of structure, but which may be informative in other respects, too.

### CHOICE OF STRUCTURE

The range of structures appropriate to a not-for-profit arts organisation are:

- Written Constitution
- Trust
- Friendly Society
- Industrial & Provident Society
- Incorporated Scheme under the Charities Acts
- Company

Among these, the single most important distinguishing factor is that some provide *separate legal status* and *limited liability for members*, while others do not.

#### *Separate legal status*

This means that the organisation has its own legal personality, separate from the individuals who are its members. It can transact business in its own right. Members may come and go, but the organisation continues to exist independently.

#### *Limited liability for members*

This means that the members of an organisation are not personally liable for the debts or other obligations of the organisation.

Although the benefits of *separate legal status* and *limited liability for members* are compelling, there are circumstances in which a structure that does not provide these advantages may nonetheless be more appropriate.

Take a look at each of the available options:

#### *Written Constitution*

An organisation may choose to adopt a written constitution or set of rules, as a minimal way of introducing formality in the organisation. The constitution will, at the very least, describe the objectives of the organisation, and will provide rules about membership, and decision-making. Adopting a constitution will facilitate the workings of the organisation, without changing its legal status. An advantage is that there are no registration or public accountability requirements. The business of the organisation is private to the members, and the rules can be exactly what the members want, however unusual.

However, as this option does not provide either *separate legal status* or *limited liability* for members, anything done by the organisation is done by all its members, and all the members have personal liability for the obligations of the organisation.

#### *Trust*

The trust must be distinguished from all other options, in that it is not intended to be a structure for running an organisation. It is a protective device whereby assets or capital may be devoted to a particular use and administered in a way that can be closely defined. Trustees are appointed and are obliged to administer the trust property in accordance with terms that are usually spelled out in a trust deed.

A trust is appropriate where an organisation is initially based on a donation, or is a type of foundation with a static purpose, rather than an evolving arts organisation. Outside that context, the trust has disadvantages. The terms of the trust deed can be difficult and even impossible to alter. Trustees, once appointed, can be impossible to remove. The law of trusts is arcane and complex and, if problems arise, recourse to the courts is often the only solution.

There are, however, circumstances in which the trust is an appropriate vehicle to fulfil an arts objective. The Hugh Lane Gallery is a good example. Sir Hugh Lane bequeathed his art collection to Dublin City Council (formerly Dublin Corporation) under the terms of a trust that obliged it to provide suitable gallery facilities to house the collection and to show it to the public free of charge. The gallery was, until recent years, administered directly by Dublin City Council, having no independent structure of its own. The trust can be seen here in an appropriate setting. It provided neither independent *legal status* nor rules for the running of the organisation. It was, however, an effective method of safeguarding assets and directing the way they were to be used.

### *Friendly Society*

A Friendly Society is an association registered under the Friendly Societies Act, a Victorian statute designed to facilitate voluntary charitable relief. A separate category of 'specially authorised societies' includes those for the promotion of music, science, literature and the fine arts. A handful of bodies are registered under this provision. These include a creamery, a society of anglers, and an archaeological society, but not as yet a single arts organisation.

A Friendly Society provides a template for an organisation. Beyond this, however, it has limited appeal, in particular as it does not provide either *separate legal status* or *limited liability* for its members.

### *Industrial & Provident Society*

The Industrial & Provident Societies Act of 1893 is another piece of Victorian legislation, this time designed to meet the needs of the co-operative movement. As a rule co-operatives were trading associations. They tended to do business principally with their own members. They aimed at limiting the price charged for what they sold, and even if they distributed profit to the members, their principal objective was not to earn high profits but to improve trading conditions for their members.

The Industrial & Provident Society provides both *separate legal status* and *limited liability for members*. To form such a society, it is necessary to register with the Registrar of Friendly Societies. A set of rules must be lodged with the Registrar. There must be a minimum of seven members. Profits may be distributed amongst the members, although this is not a requirement. Audited accounts must be furnished annually by the Society to the Registrar.

As to the type of society that may register, the Act specifies societies "for carrying on any industries, businesses or trades". This raises the question as to whether an arts organisation, in particular a non-profit-making arts organisation, may register under the Act. Does it carry on an industry, business or trade?

In practice, it appears that the Registrar takes a wide view on this. There are half a dozen societies registered whose principal objectives centre around arts, cultural and heritage activities. A graphic arts co-operative is on the register, as well as a couple of arts-related festival societies. Although not designed with the arts in mind, this model might be suitable for a member-centred organisation that sees itself as co-operative in nature.

### *Incorporated Scheme under the Charities Acts*

This is a scheme whereby the Commissioners of Charitable Donations and Bequests in Ireland can grant *separate legal status* to a charitable organisation. It is principally of interest to an organisation already established as a trust. Before the Commissioners consider an application, they require a copy of the deed establishing the trust, a legal opinion on its charitable nature and evidence that the organisation has been granted charitable status by the Revenue Commissioners for tax purposes.

This provides a way in which a trust may obtain *separate legal status*. But because of the complex nature of the law of trusts, the extent to which it confers *limited liability* on the trustees is debatable. Very few such schemes are incorporated. There are, however, a few arts bodies amongst them, for example, The Royal Irish Academy of Music and Kilkenny School of Music.

## Company

The laws governing the creation and operation of companies in Ireland are the Companies Acts 1963-2005.

A company has significant advantages, including:

- It is the most common vehicle for doing business and most people are familiar with it to some degree;
- It grants *separate legal status* to the organisation;
- *Liability of the members is limited*, meaning that they are, with some exceptions, not personally liable for the acts of the company;
- The Companies Act 1963 provides model constitutions for each type of company. These can be tailored to suit individual organisations;
- The obligations to register and report annually to the Companies Registration Office mean that information about companies particularly financial information is in the public domain, and this creates confidence;
- Confidence is also inspired by laws that punish insolvent, fraudulent and reckless trading by company officers. These help offset any fear that *limited liability* may encourage irresponsible behaviour.

An overwhelming majority of arts organisations in Ireland operate under the umbrella of a company structure. **CHAPTER 2** examines the *guarantee company* in some detail.

## THE STATUTORY BODY: A CATEGORY APART

In addition to the types of structure described in this chapter, there is a category of arts body with a structure that is determined, not by the choice of those involved in the organisation, but by legislation. This is the *statutory body*. Its nature and constitution are determined by the legislation creating it. A number of our National Cultural Institutions are *statutory bodies*. Each of them has its own unique structure. The National Gallery, for example, was established by an Act of 1854 and is regulated by a number of pieces of legislation, the last being the National Cultural Institutions Act of 1997. These provide for a Board of Governors and Guardians, which is appointed by and answerable to the Minister for Arts, Sport and Tourism. *Statutory bodies* are a category apart, and largely outside the ambit of this publication.

## THE ARTS ORGANISATION AS A CHARITY

The legal structures explored in this chapter comprise the range of those which may be used by a 'not-for-profit' arts body. The phrase 'not-for-profit' simply means that any profit made is reinvested in the organisation, rather than paid out to its members. It is, in this sense, the opposite of 'commercial'.

A 'not-for-profit' organisation is not the same thing as a charity. The Revenue Commissioners treat many not-for-profit bodies as having 'charitable status' on the basis that they have educational objectives and fulfil certain other requirements. While many arts organisations enjoy this status, they would not otherwise think of themselves as charities.

The word 'charity' has never had a clear legal meaning in Ireland. This is about to change under legislation which will bring arts bodies into a new system of registration and regulation of charities.

On March 9<sup>th</sup> 2006 the Government announced its approval for a scheme for the regulation of charities. In introducing the *General Scheme for the Charities Regulation Bill 2006*, the Minister for State at the Department of Community Rural and Gaeltacht Affairs explained the underlying intention of the *Scheme* as follows:

*An integrated system of mandatory registration and proportionate regulation and supervision of the charities sector will be introduced for the first time in Ireland. For the first time, too, there will be a statutory definition of what a charity is.*

As the proposed definition of 'charitable purpose' in the *General Scheme* includes "the advancement of the arts, culture, heritage or science", it seems certain that arts bodies will come within the new framework which will be established for the registration and regulation of charities.

Information concerning the proposed scheme can be found on the website of the Department of Community Rural and Gaeltacht Affairs, at **[www.pobail.ie/en/CharitiesRegulation](http://www.pobail.ie/en/CharitiesRegulation)**

### **A NEW STRUCTURAL MODEL FOR CHARITIES**

The need for a new type of *legal structure* for voluntary bodies has been argued by both the Law Society and the Law Reform Commission. It is now accepted by the relevant Government Departments that existing models are inadequate and that a more suitable form is needed. In introducing the *General Scheme for the Charities Regulation Bill*, Minister of State Noel Ahern said on this issue:

*It is not intended to hold up progress in introducing legislation to regulate the charities sector for the first time in Ireland, as promised by the Government, pending consideration of separate, longer-term questions such as this.*

*However, in conjunction with relevant Government Departments and other bodies, the Department of Community, Rural and Gaeltacht Affairs will continue to monitor developments, including the outcome of the review foreseen in the UK within five years of the proposed introduction of a new form of incorporation for charities, the Charitable Incorporated Organisation (CIO).*

It would seem therefore that, while the problem is recognised, the possibility of a solution is several years away.

## CHAPTER 2 INSIDE THE GUARANTEE COMPANY

The *guarantee company* is the most common legal structure used by arts bodies in Ireland, yet its underlying structure is not generally understood. For this reason, it is worthwhile examining how it works.

Companies can be divided into those that distribute their trading profits amongst their members, and those that reinvest it in the company.

Not-for-profit companies are normally registered as companies limited by guarantee without a share capital. The essential features of this type of company are:

- It enjoys the usual advantages of incorporation, including *limited liability* and *separate legal status*;
- It may not distribute profit to its members, but must reinvest it in the company;
- On winding-up of the company, the members promise to pay a nominal sum (usually €5) towards the obligations of the company. This guarantee of payment gives the *guarantee company* its name;
- *Guarantee companies* are permitted, subject to certain conditions, to dispense with the use of the word 'limited' after their names.

A *guarantee company* must have at least seven members. Two directors and a secretary are also necessary, although the directors can be drawn from the membership, and one of the directors may act as secretary. A total of seven persons must therefore be available.

While the directors may be drawn from the membership, the roles of member and director are not interchangeable. To appreciate the way in which the company works, it is important to understand the difference between these two roles.

### ROLES OF MEMBER AND DIRECTOR

The members of a *guarantee company* are called its 'stakeholders'. This implies that they have a 'stake' in the company. They are the people who have an investment in the success or failure of the company.

Company law provides that certain fundamental decisions regarding the company can only be made by the members. These fundamental powers include the making of any alteration to the constitution of the company. This gives the members certain high-level powers that cannot be delegated, although they are not often exercised. In practical terms, the role of the member of a *guarantee company* often involves little more than attendance at the Annual General Meeting (AGM) of the company.

Although the Companies Acts reserve certain powers to the members of a *guarantee company*, they do not legislate for the powers of the directors. This leaves it open, in framing the company constitution, to allocate to the directors whatever powers are considered appropriate, up to (but excluding) the powers reserved to the members by law. The role usually allocated to the directors by the company constitution is to 'manage the business' of the organisation. This gives the directors a wide ambit of authority to direct the affairs of the company, but they exercise it (at least in theory) at the behest of the members.

*(Note that, while it is the word 'manage' that is most often used in legal documents to describe the role of the directors, in current business practice the term 'govern' is used instead, while the term 'management' is reserved for the function of the executive. This distinction is explored in CHAPTER 3).*

Depending on the circumstances surrounding the formation of the company, it may or may not be easy to decide who will be the members of the company, and who will be the directors. In the case of a small group of people who wish to share equally the responsibility for all decisions, it may be appropriate that they all act both as members and directors. In the case of an organisation consisting of a group of artists who have a common purpose, but who do not want to play an active role in the running of the organisation, it may be appropriate for the artists to act as members, and to appoint a board of directors (which can include some artist representatives). Where there is a large group involved, it can be practical for all of them to act as members, electing a smaller number to act as directors. This decision is one that should be discussed by the group amongst themselves, and with their solicitor, to arrive at the best solution.

It is necessary to sound a warning where the formation of the company is promoted by another organisation or body, such as a local authority. It may be necessary for that body to appoint the members of the arts organisation, as there may be no one else who can make the appointments. However, the promoting body should make it clear to the appointees that, once appointed, their function will be to act at all times in the best interests of the arts body. By law they will not be at liberty to prefer the agenda of the promoting body. It would be best in these circumstances for the promoting body to refrain from selecting the directors, leaving this to the newly appointed members.

## **CONSTITUTION OF THE COMPANY**

The constitution of the *guarantee company* consists of its Memorandum and Articles of Association.

### *The Memorandum*

A company is obliged to register a Memorandum of Association with the Companies Registration Office. The Memorandum must state the name of the company and its objects. It must specify that the *liability of the members is limited* and that each member undertakes to contribute a certain sum towards the debts of the company in the event that it should be wound up. Finally, it must contain a list of the first members of the company.

It is useful to see the Memorandum of Association of the company as the mission statement of the organisation. The objectives contained in the Memorandum express the core values that will guide the organisation's work. The Memorandum can also be seen as defining for the benefit of third parties, the work that the organisation sets out to do and the basis on which it will conduct its relationships, i.e., with *limited liability*.

In drafting the Memorandum, members and directors should take care to see that the objectives are sufficiently widely stated to allow the organisation to do all the things it wishes to do. On the other hand, objectives should not be so widely drawn that the directors of the company are empowered to carry out a range of activities that was never intended and might conflict with the principal aims of the company.

### *The Articles*

In contrast to the Memorandum, which can be viewed as defining the relationship between the company and the outside world, the Articles of Association define internal relationships within the company. This is the rule-book of the organisation. In the Companies Acts, they are described as the 'regulations' of the company.

Companies as a matter of course register their Articles with the Companies Registration Office.

A standard set of Articles will cover:

- Membership of the company;
- Holding of members' meetings;
- Voting and other procedures for members' meetings;
- Appointment and retirement of directors;
- Powers and duties of directors;
- Procedures at directors' meetings;
- Duties of directors in relation to the keeping and auditing of accounts;
- Role of the company secretary.

### **BALANCE OF POWER**

In setting out the directors' functions, the Articles define the balance of power between the members and the board of directors.

In some organisations, the roles of member and director are played by exactly the same people. Where this occurs, the balance of power between them is unlikely to be tested. Where the roles of member and director are played by different people, however, conditions exist for disagreement between the two decision-making bodies. What do the Articles say about this? Which of the two bodies has the right to decide any given issue?

Most Articles will be found to contain the following provision, or something similar:

*The business of the company shall be managed by the director who may exercise all such powers of the company as are not by the Act (i.e., the Companies Acts) or by these articles required to be exercised by the company in general meeting, subject nevertheless to the provisions of the Act and of these articles and to such directions, being not inconsistent with the aforesaid provisions, as may be given by the company in general meeting...<sup>1</sup>*

Decoded, this provision defines the balance of power between members and directors. The board is empowered to 'manage' (in modern business parlance 'govern') but subject to the power of the members over matters allocated to them by the Companies Acts (including the power to alter the Memorandum and Articles of Association of the company), or by the Articles, and to directions given by them over matters falling outside the ambit of control of the directors. These powers of the members must be exercised by them in general meeting.

It is possible to vary the provision above, contained in the Articles. The meaning of 'management' or 'governance' by the board may be spelled out in some detail. The wide power implied by the provision may be cut down. What cannot be changed, however, is the right of the members to control the Memorandum and Articles of Association.

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<sup>1</sup> This Provision comes from the sample set of Articles provided in a schedule to the 1963 Companies Act

## BALANCE OF POWER IN OPERATION

Although the balance of power is fixed to an extent by law, in practice it can be observed in different ways, for example:

*Temple Bar Gallery & Studios Limited was incorporated as a 'member-led' organisation. It has always been the true intent that the members would play an active role in the company. The board enjoys the general power to manage as described above, but the members have passed resolutions in general meeting to direct the actions of the board in certain matters, for example, concerning the rules of membership of the organisation. The power of the members is appreciated in that organisation, and while this gives rise to periodic tension between board and members, it also provokes debate and provides the dynamic to motivate change.*

In contrast to this example, there are many arts and other voluntary organisations in which the members never exercise the powers they enjoy. They may attend the AGM and be happy to nod their heads in approval of all the proposals of the directors.

## SUITABILITY OF A GUARANTEE COMPANY AS A STRUCTURE FOR ARTS ORGANISATIONS

There are difficulties inherent in the structure of the *guarantee company* that can hinder the smooth functioning of an arts organisation.

The principal difficulties are:

- The constitution is not well understood;
- The structure itself is not well suited to the needs of an arts organisation.

### *Constitution is not understood*

Organisations often decide to incorporate in order to obtain *limited liability*. Sometimes the implications are not understood. Once incorporated, the company may come to terms with the essential company duties of holding the AGM and reporting to the Companies Registration Office, usually with the aid of the company accountants. At this point, the company is functional, and provides the benefits of *limited liability* as well as *separate legal status*.

However, the underlying relationship between members and directors, and the mechanics for decision-making, are sometimes poorly understood. The constitution of the company may not reflect how the company operates in practice. Drafting of the Memorandum and Articles of Association may have been given scant attention. They may be regarded as a legal necessity and left to gather dust on a shelf.

There are two disadvantages here. First, the company does not have a 'real' constitution of any worth. The benefits of having a clear statement of the core values of the organisation, and a transparent decision-making process will be missing. If this shortcoming is perceived, it may be addressed by drafting policy documents and regulations. These may be quite at odds with the Memorandum and Articles of Association that legally govern, although dusty and abandoned!

The second disadvantage can now be seen. A dispute erupts. The Memorandum and Articles of Association are pulled from the shelf, either in the hope that they may provide a solution, or to be waved about triumphantly by one or other of the protagonists to the dispute. It is discovered that the board has been making decisions totally outside its ambit of authority. Meetings have not have been properly convened. Decisions have been made without the required quorum. Embarrassment and confusion reign and the temperature rises even further.

### *Structure is not suitable*

The reason that arts organisations sometimes fail to understand their legal constitution is that the Memorandum and Articles of Association are often couched in dense legal language. While it is possible to draft the documents in a more user-friendly form, this requires teamwork between the organisation and a solicitor with a close understanding of the needs of the organisation.

In addition, company law is becoming increasingly sophisticated. Not every arts organisation has a lawyer on the board to provide guidance. Without one, it is difficult for an organisation to be confident that its decisions and activities are compliant with current company regulations.

Finally, there is the basic premise that control of the company resides in the membership, with the board's power to manage arising by delegation from the members. This may suit some arts organisations, but for many if it is properly recognised at all it can be a structural stumbling block.

These are some of the problems; there are no doubt others. Their roots lie in the fact that company structure was not designed for the needs of not-for-profit organisations. A simpler structural model is needed, with at least the option to have just one decision-making forum, and which is not burdened with the whole complicated corpus of company law. Although there are proposals for a simpler type of corporate structure for voluntary bodies, such a model does not yet exist.

## **MAKING THE BEST OF THE GUARANTEE COMPANY**

The best advice that can be given to organisations structured as *guarantee companies* is as follows:

- *Understand the structure of the company*

Before deciding to incorporate as a *guarantee company*, all the options available should be considered, to ensure that the *guarantee company* is the right choice.

When the company is incorporated, copies of the new Memorandum and Articles of Association should be given to the first members, the directors and secretary. Some time should be devoted to making sure that everyone understands and feels comfortable with the new structure. Key employees should also be briefed about the structure.

- *Pay particular attention to the drafting of the company constitution*

The organisation needs a solicitor to attend to incorporation of the company, and to collaborate on the design of the company's Memorandum and Articles of Association. As the incorporation of commercial companies has become standardised, solicitors are no longer in the habit of drafting innovative constitutions. The organisation needs a solicitor who is willing to go through a number of drafts with the members, to advise on the company law constraints, and at the end of the day to produce an agreed constitution that is tailor-made to the organisation.

This need not be a prohibitively expensive operation. While it requires close attention, much of the work can be done by the members. The role of the solicitor can be greatly simplified by proper briefing. It may be a good idea for the members to nominate two or, at most, three people to liaise with the organisation's solicitor.

And, finally, the constitution may not be right the first time around. It may be necessary to revisit it several times in the years following incorporation, in order to make adjustments and iron out any wrinkles that may have emerged.

- *Use the company structure in the day-to-day work of the organisation*

When the company is incorporated, it is up to the organisation to adapt itself to the framework it provides. If the drafting has been done with care, and everyone is familiar with the new structure, it can be used in the everyday work of the organisation.

Subsequently, if procedural questions arise at every board meeting, such as: do we have a quorum?; is this a matter for the members?; or how much notice do we need to give for that meeting?, the organisation may have a problem, but it is unlikely to be connected with the structure. However, if these procedural questions never arise, the chances are that the company constitution is gathering dust somewhere. If, from one AGM to the next, the Memorandum and Articles have not been consulted on any single point, it is probably time for the directors to take them home and re-read them, to make sure that they are in fact governing the organisation in accordance with its constitution.

- *Attend to the maintenance of the company*

Like anything else, the company needs to be cared for. One way in which the company is serviced is by the annual performance of the company's *statutory duties*, primarily the holding of the AGM and the preparation and presentation of the accounts. These obligations are not merely a legal duty. They provide a valuable opportunity for members and directors to review the company's performance over the preceding year, to assess its financial situation, to elect or re-elect directors and secretary in place of those retiring, and to anticipate what the next year may bring. These things are good for the health of the organisation.

It is fruitful to see the structure as something flexible. Neither the Memorandum nor the Articles of Association are cast in stone. They may need to be altered to reflect change in the organisation. Whether or not the need is apparent, periodic review of the structure is another way of keeping it fit and in tune with the activities of the organisation.

## CHAPTER 3 ROLE OF THE BOARD

To act with confidence, a board needs a clear understanding of its role and purpose.

### DEFINING THE ROLE OF THE BOARD

Two facts common to almost every organisation are helpful in attempting a definition of the *role of the board*. Firstly, an organisation with a written constitution has a defined set of objectives. If the organisation is a company, this is contained in the Memorandum of Association of the company. The objectives may have been badly drafted; they may be out of date; they may be contained in more than one document. Whatever their condition, however, the objectives are the mission statement of the organisation. They are the fundamental reference point in identifying the end to which the work of the board is directed.

Secondly, most organisations designate a governing body, which in the case of a company is called 'the board of directors'. By whatever name it is called, this body is normally entrusted with the job of 'managing' the organisation.

Drawing on this information, one can say that:

*The board manages the business of the organisation, so as best to achieve its stated objectives.*

This short definition can be elaborated into a list of functions that flow from it. Before doing so, however, a problem of terminology should be dealt with.

The board, according to the definition, 'manages' the business of the organisation. As we have seen in **CHAPTER 2** this is the word most often used to describe the *role of the board* in legal and other company documents. However, in modern business parlance, the board does not 'manage', but rather 'governs' the business of the organisation, with 'management' being entrusted to the tier of responsibility below it, usually headed by the chief executive officer (CEO). It is helpful to adopt this distinction, and to see the *role of the board* in terms of governance, with the authority and the responsibility to give agreed direction to management.

Taking the definition as a starting point, the role of governance can be expanded in the following way:

*The board interprets and guards the mission of the organisation*

The constitution of the company dictates the extent to which the board controls the mission of the organisation. It may be that the board has a free hand to write and re-write the aims of the organisation. Or, as is the case in a company limited by guarantee, the role of the board may be limited, with the power to determine the aims of the organisation being vested in the members of the company.

Either way, the board is the interpreter of the mission. The absence of control does not diminish the creative opportunity for the board to explore the ways in which the objectives of the organisation may be fulfilled.

The board is also the guardian of the mission; it is its job to ensure that what the organisation does is compatible with its aims. It also falls to the board to initiate debate about the aims of the organisation, when it is appropriate to do so, and to facilitate any process of change that may be necessary.

### *The board establishes policy*

To set about achieving the aims of the organisation, the board needs to develop its thinking on the tasks required to achieve them. In other words, it needs policies to direct what the organisation does.

Boards vary in the extent to which they organise their thinking. Some settle for making decisions on an ad hoc basis. While this may work at a functional level, leadership of the organisation will be lacking. There will be no sense of direction. Effective boards develop pro-active policies that interpret the aims of the organisation, and demonstrate the manner in which the organisation will bring those aims to fruition. The objectives of the organisation will dictate both overall strategy and the principal areas of policy-making. These will centre on the specific artistic aims of the organisation. Policy-making will also be appropriate in relation to the manner in which the work of the organisation is conducted, involving areas such as fundraising, employment practices and other aspects of administration.

The CEO is normally expected to make an important contribution to policy-making and may frequently take the lead in proposing policies to the board. While this can be very helpful, it is important that the board does not abdicate its policy-making function to the CEO. Policy is one of the central aspects of governance. If a board shirks this aspect of its role, it will soon become a rubber stamp for the CEO. This will not benefit the organisation. It is certainly appropriate for the CEO to propose policy. It is equally acceptable for the board to delegate certain specific policy decisions to the CEO. But it should be clear between them that the final responsibility rests with the board.

In the course of decision-making, policies will evolve that are never committed to writing. However, the exercise of producing written policy papers is exceptionally valuable. It promotes clarity and understanding among board members, as well as providing an invaluable reference point for staff members who will implement the policies.

### *The board ensures effective organisational planning*

To translate policy into action, organisational planning is needed. The board should ensure that the organisation has both short-term and long-term plans for its work.

A plan should, at minimum:

- State the policy objectives that are the subject of the plan;
- Describe how they are to be achieved;
- Set clear and realistic performance targets; and
- State how the plan will be funded.

Plans are normally produced by the CEO, in liaison with the board. Many organisations produce both a one-year and a three-year plan, which are reviewed annually. In addition to setting the agenda for the organisation's work, the plan acts as the standard against which achievements can be measured in any given period.

In addition to ensuring the preparation of plans for the organisation's work, an effective board is likely to produce a parallel plan for its own activities.

### *The board ensures that the organisation has sufficient resources*

All the plans in the world are useless unless there are sufficient resources to implement them. It is squarely within the remit of the board to ensure that the organisation has the funds necessary to carry out its work. This cannot be achieved unless the organisation has:

- *A financial strategy*  
The board must ensure that the activities of the organisation are costed in advance, and that funds are available to finance the activities.
- *Budgets, and monitoring of expenditure*  
The board must ensure that the organisation budgets its funds across the spectrum of its activities. It must monitor expenditure on a regular basis, to ensure that the money will be available to fund all the planned activities.
- *Close liaison with the CEO on financial matters*  
The board will need to liaise closely with the CEO on all matters of financial planning. It will rely on the CEO to prepare the draft annual budget, and monthly management accounts, for discussion and approval by the board. Discussion between the CEO and the board concerning financial performance should occur at every board meeting. It is incumbent on every board member to be satisfied about the organisation's financial health, and to raise whatever questions may be necessary for this purpose.

The financial responsibilities of the board are of paramount importance. Unless the finances work, the organisation may not survive. At the very least, the arts work of the organisation will be compromised. Company directors must also bear in mind the legal sanctions with which company directors may be personally penalised for taking a casual approach to financial matters.

For all of these reasons it is of enormous benefit to an arts board to have at least one member who is either an accountant or is otherwise well-qualified in matters of finance.

### *Fundraising*

The question sometimes arises of the extent to which board members should participate in fundraising.

While it is clearly the responsibility of the board to ensure sufficient resources, this does not necessarily mean that board members must take an active part in raising funds.

In the United States, an appointment to the board of a not-for-profit organisation usually carries the expectation that the board member will generate income for the organisation. This is not so in Ireland, although some appointments are undoubtedly made on the basis of the business or social contacts of the board member. There is no harm in this, provided mutual expectations are dealt with in an open manner, to avoid offence and disappointment.

The approach of the board to fundraising will depend on the skills it has to hand, on the agreement it has with its CEO, and on the manpower within the organisation that can be devoted to fundraising.

An organisation that depends on fundraising, but which is short of fundraising skills, should consider other available options, including:

- Setting up a fundraising committee with skilled non-board members;
- Hiring a fundraiser;
- Reducing its dependence on fundraising, by devising new sources of earned income.

### *The board communicates its policies and plans*

The board will work closely with the CEO, who will be central to the development of policies and the production of organisational plans. Undoubtedly, the CEO will brief members of staff who

need to know those policies and plans. However, it may not always occur to the board that wider publication of the policies and plans may benefit the organisation. Press releases, an article in the organisation's newsletter, sending copies of policy documents to sponsors – these, and other ideas, may be used by the board to promote understanding of the work of the organisation.

### *The board delegates to the CEO*

The board, according to our definition of its remit, is responsible for governance of the organisation. By delegation of power from the board, the CEO manages the business of the organisation on a day-to-day basis.

The relationship between the board and the CEO will to some extent have been explored in drafting the CEO's contract of employment. But, however well-defined the contract may be, a lot will depend on the personalities involved. This often becomes clear only when a new CEO is in place. If the board has to adjust, this is not necessarily a bad thing! Underlying the relationship between every board and its CEO is a tension about the exercise of power. The continual resolution of this tension can be seen as the basis for the relationship. It has tremendous creative potential.

### *The board monitors the performance of the organisation*

At the end of every year, in conjunction with the CEO, the board should evaluate the performance of the organisation over the preceding year, against the plan for that year. This will inform policy and planning for the forthcoming year. It provides an opportunity for a useful exchange between the CEO and the board on the bottom-line issue of what the organisation is actually achieving. If the organisation is falling short of its targets, the review provokes an examination of why this is so.

In addition to monitoring performance against plan, board members will also monitor the performance of the organisation in a more general way, picking up both positive and negative feedback wherever they can, both inside and outside the organisation.

### *The board reviews its own performance*

It is an excellent idea for the board to skip a regular board meeting once a year, and to hold a 'board development' session instead. This can be used to look back over the previous year, to reflect on what was learned, and to plan for the year ahead. It can be useful to focus not only on what the board has achieved, but the way in which it operates, including the way it works together as a group.

Some boards like to bask in a little self reflection, but others have a resistance to it. For a reluctant, self-effacing board, it can be useful to engage a trained facilitator to get the process started.

### *The board is accountable to the stakeholders in the organisation*

The boards of all arts organisations are in some sense accountable to others. While a successful board will not feel burdened by this notion, it should be aware of those who have a stake in the work of the board. In the case of a company limited by guarantee, the board is legally accountable to the members of the company. That said, whatever the structure of the organisation there will be other parties, who, while they may not have any legal status, might be regarded in a wider sense as 'stakeholders'. The Arts Council, when providing grant-aid, certainly falls into this category. So do sponsors and other funding agencies, as well as 'friends' who make a financial contribution to the organisation. Some of these will expect the organisation to behave in a way that acknowledges their 'stake'. Others may hardly be aware of the interest that they have in the success of the organisation.

It is part of the remit of the board that it carries out its functions in a way that discharges its formal obligations to legal stakeholders in the organisation. However, a good board will also maintain an awareness of its wider constituency of interested parties, and will understand the ways in which it aspires to acknowledge the interest of those parties.

Another issue should be clarified in this context. As mentioned in **CHAPTER 2**, although it is best avoided, it does happen on occasion that a party with a stake in an organisation appoints one or more members of the board of the organisation. Once appointed to the position, it is the duty of the board member to act at all times in the best interests of the company. This is a legal duty, irrespective of whatever conflict may arise between the interests of the company and the interests of the stakeholder. A company director is simply not at liberty to use a position within the company to advance the cause of the stakeholder at the expense of the company.

#### *The board ensures that the organisation is law-abiding*

This aspect of the board's role draws attention to the need for arts organisations to have ready access to legal advice. Increasingly complex legislation affecting many areas of activity means that, without a lawyer on the board, it can be difficult to be sure that the organisation is dealing adequately with its wide range of legal obligations.

Apart from the *statutory duties* imposed on companies, the organisation has to take account of legislation affecting a wide range of issues, including employee relations; health and safety in the workplace; environmental regulations; building control and fire safety regulations. Over and above this, the organisation has to ensure compliance with all its contractual obligations, including the terms under which it occupies its premises. And finally, the organisation has a general duty of care to everyone who visits its premises.

To ensure that the organisation is law-abiding is therefore quite a task. In practice, much of the burden is carried by the CEO, who will generally know when to look for advice.

However, issues for discussion or decision often arise at board level when knowledge of the legal position is essential or, more worryingly, when (unless a lawyer is present) the board may not be aware that legal advice is needed. Little can be done about this, except to encourage arts organisations to keep a lawyer on the board. Where this is not possible, there is a greater need to develop a long-term working relationship with a good solicitor. While legal services can be expensive, an organisation cannot afford to be without the necessary advice.

#### *The board ensures its own maintenance and succession*

It is easy for a board to work away enthusiastically, without ever asking some pertinent questions about itself, such as whether the board is too big, too small, in need of training in certain areas, and an issue that is often forgotten until a key member of the board is about to leave whether its own succession is assured.

It is part of the function of the board to ensure its own continuity. This involves planning the filling of vacant seats on the board, as well as ensuring in so far as is possible that key positions such as that of chairperson will not become vacant without a suitable replacement to hand.

## **RECRUITING BOARD MEMBERS**

The most common way in which arts organisations fill vacant positions on the board is through the business and arts contacts of existing board members.

Typically, the vacancy is discussed at a meeting, the board members give it some thought and suggest possible candidates. The suggestions are discussed at the next meeting and if any of them appears promising, a decision is made as to how the candidate might best be approached.

In addressing the issue of a vacancy, it is important for the board to identify the skills it is seeking in a new board member.

In the UK, the organisation Arts and Business operates a board bank of business personnel who are willing to sit on the boards of arts organisations. Until recently there was no such facility in the arts sector in Ireland, although the concept was explored by Business2Arts. However, recently the Association of Chartered Certified Accountants (ACCA) and Disability Federation of Ireland (DFI) established Boardmatch Ireland. Based on a Canadian model, it offers services to voluntary organisations including board placements.

Of course, new board members must be properly appointed in accordance with the constitution of the organisation. If it is a company, the Articles of Association will generally allow for co-option of a new member to fill a casual vacancy, or as an addition to the existing board, until the next AGM. The person co-opted can then go forward for election at the AGM. The appointment of each new board member must be notified to the Companies Registration Office on *Form B10*.

It can be helpful to think of the board as dynamic, and continually evolving, in terms of its personnel. There is no reason why the same nine people should sit at the same board table for nine years in a row, just because no one resigns. While some continuity is necessary, new blood helps to keep a board fresh and on its toes.

A board can be watchful on a continual basis for potential candidates, and offer a position whenever a suitable candidate occurs, rather than waiting until the need actually arises.

## CHAPTER 4 THE ELEMENTS OF A 'GOOD BOARD'

Some arts organisations appear highly successful, dynamic and productive, enjoying a good public profile, attracting interest and respect.

What is behind this success? Has it anything to do with organisational ability? Is success determined by the standard of board performance and, if so, is it possible to identify the factors which would give a board the best chance of success?

It is impossible to argue that organisation is the determining reason for success. An arts group may appear on the scene with such a creative idea that it will command an immediate following. In a quieter way, a new organisation may tap into a need or an interest that is not being satisfied. Such organisations may be loosely run by an ad hoc group, or by one or two dynamic individuals. They may be casually, even chaotically organised, but it doesn't matter. Their *raison d'être* is enough to guarantee success at least for a time.

If we accept that success is possible without a *good board*, what about the converse? Is failure possible with a *good board*?

This question brings us closer to identifying some important issues for an arts board. Arts organisations now incorporate in a form similar to businesses. More than ever before, they are required to behave as businesses in order to survive. In the image-conscious world in which we live, there is enormous pressure to conform to certain media-led models of behaviour.

Failure to project the 'right' image may doom a venture to failure. These factors might easily condition the perception of a *good board* as one with a fair share of prominent business people, and which behaves according to current theories of best business practice. It is necessary to tread carefully here, not just to avoid offending business people who give generously, and often creatively, of their time to arts organisations, but because there is an issue that it is important to articulate.

The arts in Ireland are better resourced than in the past. This provides new opportunities. It is a time, however, when business ideals are heavily dominant, and success is measured in very material terms. Add to this the culture of accountability and you find a strong temptation to accept that business methods and standards provide the best models for arts bodies, and the only yardstick by which to measure all activity which is publicly funded.

There are things that may be lost in such an approach. Business methods may have much to offer arts organisations, as they seek to avail of more prosperous conditions. However, arts organisations are not businesses. The measure of success in arts terms centres on values and not on profits. It would be a mistake for an arts organisation to believe that adopting standard business solutions will necessarily guarantee a *good board*, and hence a successful organisation.

However, a board that has a keen understanding of what the organisation is about, coupled with an understanding of its own values, is unlikely to fall into an outer-directed approach. It can develop confidence in devising its own solutions, picking and choosing where appropriate from external advice and available models.

These issues aside, some views can be offered on certain 'ingredients' of board make-up and behaviour. Properly worked, these factors may promote success:

### *Size of the board*

Although not every board can determine its own size, many can, however, influence the issue. There is no magic number and what is a good number will depend on the particular structure of the organisation. If, for example, there are a number of board committees or sub-committees, then a large board may be a good idea. Large boards can otherwise be unwieldy.

As to what is large, few boards have more than 20 members. By most standards, 15 is regarded as a large number, especially from the standpoint of conducting meetings at which all voices can be heard in an acceptable timeframe. As to small boards, most would say that fewer than five is hardly a board at all. Although many small businesses operate with two, three or four, it can be difficult with such small numbers to obtain a quorum for meetings. The majority of arts organisations funded by the Arts Council have between seven and 10 board members.

It is worth bearing in mind that there are times in the development of an organisation when it is appropriate to review the size of the board. After a period of growth, it may be advisable to expand the board in order to take on new skills which are needed, or just to draw extra hands on board to help share the responsibility of the increased activity.

Equally, if the board makes changes to its modus operandi for example by deciding to delegate work to committees, it may be a good idea to expand the board.

### *Make-up of the board*

It is undoubtedly of use to have certain skills represented on the board. Legal, financial and other business skills spring to mind, but for an arts organisation it is equally important to have sufficiently strong artistic representation on the board to ensure that the arts agenda of the organisation is kept to the fore.

That said, most arts organisations benefit from having board members from the business and professional sectors with skills in the following areas:

- Accounting/banking/financial management
- Law
- Fundraising (if the organisation depends upon it)

These are considered 'the basics'. Others would include:

- Organisation
- Marketing
- Public relations
- Information technology

The type of knowledge available is just one way of looking at the make-up of board members. There are other considerations, for example, age, gender, geographical background, financial standing, and sphere of influence. The particular aims of the organisation may also suggest the need for board members with specific knowledge.

Then there is the issue of 'skills' in a wider sense. For the board to operate well as a group, it is obviously helpful if board members are reasonably good communicators, open-minded and amenable to the occasionally cut-and-thrust nature of board life.

### *Induction of new board members*

The way in which entry to the board is handled undoubtedly has a bearing on the performance of a new board member.

When an invitation to join the board is issued to a potential member, there should be a frank discussion about expectations. The reason for the invitation should be explained. What is expected of the invitee should be made clear. It is quite unfair to extend an invitation to board membership without explaining why the invitee's particular skills, information or sphere of influence are considered valuable to the board, and without being clear about the amount of time and effort that the board would like the invitee to commit to the organisation. It is useful to confirm this briefing, or exchange of views, in writing. This can be done in a friendly, positive way.

It is also a good idea to be clear about the benefits of board membership. These may not extend beyond the simple opportunity to become involved in an arts organisation, and to learn a little more about the arts and about board life. If so, then this should be made clear.

Finally, it is of paramount importance that the new member be properly briefed. The company constitution documents should be provided, and so also should a recent set of company accounts. Any other written material available, in the form of policy documents, company plans and so forth, should be furnished. There should also be a verbal briefing, dealing with both the structure of the organisation and most importantly its financial standing. It is not only unfair but may even in certain circumstances be actionable to invite a person to join a voluntary board without disclosing any known skeletons in the cupboard, particularly those of a financial nature.

As long as the induction process is handled properly, it does not matter whether it is conducted by the chairperson, another board member, the CEO, or a combination of the three. Ideally, both the chairperson and the CEO will be involved, but circumstances may dictate some other approach. Before embarking on the process, the board should discuss and determine the way in which the matter will be handled.

### *Training of board members*

Some research has been done on the boards of not-for-profit organisations in Ireland. It suggests that while board members feel confident about their personal skills and abilities, as board members they feel in need of training<sup>2</sup>.

Training board members is a highly effective way of improving board performance. At the same time, board members are given a valuable opportunity to enhance their own personal knowledge.

For reasons of expense, training is probably in the 'luxury' category for most boards. However, there are possibilities worth considering:

- Sponsorship can be sought from firms that conduct training programmes. They may be glad to occasionally fill places unsold, either gratis or in return for the sponsorship benefits which the organisation normally offers;
- Business2Arts provides occasional opportunities for sponsored places on training courses which are suitable for board members;
- The Arts Council organises seminars from time to time;
- An organisation known as the Wheel provides training opportunities for personnel involved in voluntary organisations. Few arts bodies are members of the Wheel, but their participation is welcomed. Many of the Wheel's activities are relevant to the arts sector.

<sup>2</sup> See Insights into the Boards of Irish Voluntary Agencies - Report on a questionnaire survey by Gwen Jaffro, School of Business Studies, Trinity College, published in Administration, the Journal of the Institute of Public Administration, Dublin, November/December 1998.

These suggestions involve finding suitable training programmes for board members to attend. There are few programmes (with the exception of those arranged by the Arts Council) which are designed with the arts organisation in mind. Most cater to the business sector. However, many business training programmes have a good deal to offer the member of an arts board.

The ideal form of board training is to engage one or more consultants to work with the specific training needs of the board. This expertise is available, but without sponsorship it is beyond the financial reach of most arts boards.

#### *Level of commitment of board members*

Board members act in a voluntary capacity and have other demands on their time. They may find it difficult to attend every board meeting. However, board members who are out of touch with the activities of the board cannot make a significant contribution.

There are many boards which carry a number of people who make only an occasional appearance at the board table. There are factors that can drain the vitality of a board and this is one of them. It is not good for morale to know that one or more members of the board have more pressing things to do than attend board meetings.

A diplomatic way of handling this situation is to insert a provision in the Articles of Association to the effect that a board member who does not in any given year attend a certain number, or percentage, of board meetings will be deemed to have offered his or her resignation to the next AGM. This is usually sufficient to provoke a useful discussion in advance of the AGM, which will one way or another change the situation for the better. Another, more pointed, way of handling the problem is to disclose attendance at board meetings in the annual report of the organisation.

#### *Conduct of board meetings*

Some pointers may be helpful:

- Meetings that are too long are an irritation, as are meetings which are rushed. A balance needs to be found, and this may require occasional discussion and adjustment of the dates and times of meetings. It may also be necessary for the board to frankly examine where the problem lies, if there is a regular feeling of dissatisfaction about the length or the rushed nature of meetings. A good barometer of how members feel about the meeting is how they behave as soon as it is over. Do they rush off briskly? Or do they stay and talk a little or go for a drink or a coffee together? Is there a feeling of a job well done, or is there a sense of frustration or impatience?
- Meetings can be dominated by an overzealous chairperson or other director. They can also be hijacked by a loquacious CEO. Both of these eventualities are problematic. Meetings are for the purpose of hearing everyone's contribution and no meeting is successful unless it achieves that objective.
- The agenda for the meeting deserves careful attention. It paves the way for efficient conduct of the meeting. Both the agenda and the documents relevant to the agenda should be circulated well in advance.
- If circulated in advance, it saves time to agree that minutes may be taken as read. The same applies to other papers circulated in advance, provided the chairperson checks that they have actually been read.

- The writing of minutes is a skill in itself. It is for the board, however, and not the minute-taker, to decide how much of the meeting needs be minuted. Most organisations prefer to minute only the decisions taken. This is based on the sound theory of collective responsibility for decision-making. Whatever the preference of the board, it should be clearly articulated for the benefit of the minute-taker.
- It is important that everyone in the organisation understands the confidential nature of board business. The board may decide to circulate its minutes throughout the organisation, but this does not mean that there is a free-for-all about the views exchanged at board meetings. Leaky boards soon become suspicious boards. Over time, they become paranoid.
- Boards of arts organisations tend to meet about once a month, with a break at Christmas and another break in the summer. One possibility is to schedule an annual strategy meeting, and an annual board development meeting. These may take place in addition to, or instead of, the regular board meeting. Another idea is to devote at least one whole meeting to the budget and/or consideration of the draft accounts.
- With a little planning, meetings should be creative, productive and enjoyable.

#### *Use of committees*

The standard Articles of Association of the *guarantee company* empower the board to delegate work to committees. This can be a useful option in busy organisations, especially as clearing houses for issues that tend to take up a lot of board time.

It is necessary that the board carefully considers the composition and the terms of reference of each committee, and commits these to writing. It is especially important that the ambit of authority of the committee be clearly defined. A fundamental question arises here in connection with the responsibility of the board. The authority for making certain decisions can be delegated to a committee of the board, but the board itself will still remain responsible for those decisions, under the company constitution. For this reason, many organisations consider it prudent that decisions of the committee be minuted and tabled at the next full board meeting for ratification. This can be a 'rubber-stamping' exercise, unless a board member spots a problem with the decision.

#### *Role of the chairperson*

Every chairperson will have his or her own style, but all will serve a number of roles in the organisation. These will include some or all of the following:

- Chairing board meetings. It is the role of the chairperson of the meeting to facilitate the meeting with the aim of drawing out the pros and cons of every issue, encouraging everyone present to participate and ultimately arriving at the best possible decision, ideally in a consensual way.
- Fixing the agenda for board meetings, in consultation with the CEO. Although a job in itself, this is part of the facilitation role which the chairperson plays in relation to board meetings.
- Chairing members' meetings. The chairperson of the board very often chairs members' meetings, although there is no necessity for this. Members may have their own chairperson or they may prefer to appoint another member to chair the meeting.

- Occasionally being called upon to act as a spokesperson for the organisation, although in many organisations it is the CEO who usually performs this function. Some bodies prefer to specifically allocate this role to a person who has particular communications or public relations skills. Any statement made on behalf of the organisation would normally, however, be cleared by the chairperson.
- Acting in a supporting role in relation to the CEO. It is a help to the CEO to feel free to call on the chairperson between board meetings for informal discussion, and sometimes to help decide whether the authority of the board is needed for a particular decision.

Over and above filling these functions, the chairperson tends to play a general role that is difficult to describe, except by reference to parenthood. The chairperson is often regarded both as an authority-figure and as someone who cares enough about the organisation to get up in the middle of the night to deal with a crisis. The chairperson should exercise a little caution here. It is easy to be seduced (especially by the gratitude of the CEO) into playing a role which usurps the authority of the board. This can over time lead to resentment on the part of the over-worked chairperson, and simultaneous annoyance on the part of the other board members.

#### *Relationship between the board and the CEO*

This is a pivotal relationship. A bad relationship between board and CEO can be disastrous for an organisation. A good relationship can make all the difference.

As with all relationships, the following are important:

- Each of the parties must be clear with the other about expectations. When expectations have not been met, each must have the courage to broach the issue.
- Trust plays an important role. Good communications normally build trusting relationships. If this does not occur, there is something amiss.
- Goodwill, good humour and old-fashioned good manners play a significant role in avoiding problems, and in solving them when they arise.

It is worth investing time and effort to make sure that these things are fostered in the relationship.

#### *Arts/business balance of board business*

The boards of arts organisations are usually composed of a mix of artists and business members. Arts matters and business matters often compete for centre stage. It can be argued that arts matters should take precedence, as the organisation exists for the purpose of serving certain artistic objectives. It can be argued equally convincingly that if the business matters are not given priority, the organisation will not continue to exist for very long.

Every board has to find its own way of balancing arts and business matters. This tends to happen naturally. However, it should be possible for board members to look back over the performance of the board in any given period and to be happy with the amount of time allocated to each. If it is clear that several board meetings in succession have been devoted entirely either to arts, or to business matters, it is time to stop and ask why.

#### *Values of the board*

Boards do not often articulate the values underpinning the way in which they do their work. It can be advantageous to recognise these values. It can enhance the sense of pride the board takes in its work.

The kind of values normally in evidence include:

### *Openness*

'Transparency' has become a buzzword. However, it is hard to escape the fact that a board which is open and frank in its dealings tends to enjoy good relations with others, both inside and outside the organisation. It is easy to see this if we compare openness with secrecy. A secretive board is generally regarded with fear and suspicion. In order to be open, it is of course necessary that board transactions are conducted in such a way that it is not necessary to be secretive about them.

Secrecy is not to be confused with confidentiality. A board may be open in its dealings, but at the same time maintain confidentiality.

### *Democracy*

Another hackneyed word; properly employed, it gives everyone the chance to speak. Once, however, a decision has been democratically made, everyone is expected to respect it. A worthy refinement is to avoid 'lobbying' on issues between meetings. It should be possible to conduct a complete discussion of an issue openly at the board table and to trust that the conclusion that the meeting will reach will be the best one.

### *Fairness*

All organisations have rules and they should be respected. However, situations can arise that have not been envisaged by the rules, or where strict observance of the rules seems unjust. In those circumstances, a board should not be afraid to look at an issue in the light of seeking a solution that is, more than anything else, a fair one.

### *Value statements*

It can be useful for a board to clarify certain other values, for example, its stance on issues such as censorship, race, colour, creed or gender. Value statements on issues such as these can help a CEO to respond quickly and confidently to public or media criticism, or to deal decisively with a problem which suddenly flares in the organisation, without the need to consult with the board.

## CHAPTER 5 LEGAL DUTIES OF BOARD MEMBERS

Board members are generally aware that there is a range of *legal duties* that apply to them as company directors. Many will also know that the framework for corporate enforcement has been strengthened in recent years, and that stiff penalties now apply to directors who fail to comply with their legal obligations.

At the same time, directors are often uncertain about the nature of their *legal duties*. This is understandable. There are 11 pieces of company legislation on the statute-book, most enacted in recent years. This fact alone makes it difficult for a director to understand the full range of his or her responsibilities.

Happily, a major overhaul of company law is underway, which will result in one consolidated piece of legislation. It is expected that draft legislation will be completed in 2006. Indications so far are that the nature of directors' duties will not change radically, but will be placed in a new context, and will be clearly and simply stated. This will be of obvious benefit to directors. It should assist arts organisations, by helping to alleviate the anxiety which many business people feel about taking on the directorship of a voluntary body.

Probably the most valuable source of information for directors concerning corporate compliance is the Office of the Director of Corporate Enforcement (ODCE), established by the Company Law Enforcement Act 2001. The principal role of the Director of Corporate Enforcement is to encourage compliance with the Companies Acts and to prosecute those who fail in their duties. The Office publishes a number of helpful booklets on various aspects of corporate enforcement. Every director and secretary of an arts organisation should obtain copies of these. They can be obtained from the ODCE at 16 Parnell Square, Dublin 1, or downloaded from the website [www.odce.ie](http://www.odce.ie)

### WHAT IS A DIRECTOR?

Before exploring the duties of the director, some general comments concerning directorships may be helpful.

In the first place, when is a director a director? When he or she is appointed? What about the director whose appointment has never been notified to the Companies Registration Office? And what are de facto directors, and shadow directors?

When the position of director is offered, and accepted, the directorship is 'legal', that is to say the appointee is responsible as a director from that point on, irrespective of the date of notification to the Companies Registration Office.

A de facto director is one who has not been validly or properly appointed, or is in some other way disqualified as acting, but nevertheless behaves as though he or she is a director. A shadow director on the other hand is someone, other than a professional advisor, whose instructions are normally followed by the board, even though no formal appointment has ever been contemplated. Both de facto directors and shadow directors can be held responsible at law as directors as though they had been properly appointed and qualified to act.

## DUTIES OF A DIRECTOR

This outline is intended to give an overview, with particular reference to the needs of the arts organisation. It is not intended to be a substitute for legal advice in any given set of circumstances. Note also, as mentioned above, that legislative developments are expected in 2006 that may alter the position.

The duties of the director fall into two categories:

### ***General legal duties of a company director;***

***Statutory duties:*** *compliance with regulations concerning the operation of companies laid down in the Companies Acts.*

### ***General legal duties of a company director***

At law, a company director is regarded as having a special duty to the company. This common law duty is sometimes called a 'fiduciary duty'. There is no all-embracing definition of what is meant by this duty. It is generally understood, however, to mean that:

- A director must act honestly, in the best interests of the company;
- A director must act with due care, skill and diligence;
- A director must avoid conflict between personal interests and those of the company;
- A director must not make an undisclosed profit from the position.

These are duties that the director owes to the company itself, and not to any third party. This is not always understood in circumstances where board members are appointed by an external body, such as a local authority. The board members may feel under pressure to promote the interests of the external organisation. They are, however, not at liberty to take this approach. Once appointed, their duty is to the company itself, and all decisions must be based on an assessment of what is best for the company, irrespective of the interests of a person or body responsible for appointing the directors.

Closely related to the *general duties* of a director are certain sanctions imposed on directors for negligent or dishonest behaviour. These can be seen as duties owed to a wider public. They oblige company directors to refrain from *fraudulent trading, reckless trading and misfeasance*.

### ***Fraudulent trading***

A person who is knowingly a party to the carrying on of the business of a company with intent to defraud creditors of the company, or creditors of any other person, or for any fraudulent purpose, may be held personally responsible without limit for all or any part of the debts or other liabilities of the company. Fraud may also result in a fine, or imprisonment, or both.

### ***Reckless trading***

If a company is being wound up, and it transpires that a director knew that the business of the company was being conducted in a reckless manner, then the director, as in the case of fraudulent trading, may be held personally responsible without limit for all or any part of the debts of the company.

A person is 'reckless' for this purpose, if:

- a) having regard to the general knowledge, skill and experience that may reasonably be expected of a person in this position, he or she ought to have known that these actions or those of the

company would cause loss to the creditors of the company; or

b) he or she was a party to the contracting of a debt by the company and did not honestly believe, on reasonable grounds, that the company would be able to pay the debt when it fell due for payment as well as all its other debts.

### *Misfeasance*

If, on winding up a company, it appears that a director - past or present - has 'misapplied or retained or become liable or accountable for any money or property of the company, or has been guilty of any misfeasance or other breach of duty or trust in relation to the company', then the court may compel the director to restore the money or property or to contribute an appropriate sum to the assets of the company.

### *Some rules of thumb*

It is possible, from this mix of common law duties and deterrents, to formulate the following guiding principles for company directors, to help them in the discharge of their general company duties:

#### *Attend board meetings, and keep yourself informed about the affairs of the company*

A person should not undertake the role of director unless willing to engage with the affairs of the company. This fact was highlighted by the decision of Ms Justice Mella Carroll in a case heard in 1985. She decided that a wife-director who claimed ignorance of company business was nevertheless equally responsible with those directly involved in the decision-making. The judge made it quite clear: *Any person who becomes a director takes on the responsibilities and duties of the position.* Ignorance was no excuse.

Ignorance can arise in a number of ways. In a case heard in 1870, Lord Fermoy failed to escape responsibility as the member of a company by claiming that he had been asleep during a meeting when certain decisions had been taken.

It is not an acceptable excuse to plead passive or nominal involvement in a company in order to escape responsibility for this activity. A person who accepts the position of director is liable to be fixed with responsibility for the decisions of the company, whether or not they are understood, or even known to the person.

#### *Be especially conscious of the financial state of the company*

Attending board meetings and knowing about the activities of the organisation is not enough. Company legislation of the last decade demands that directors know at any point whether or not the company is solvent and able to pay its debts. If the company continues to trade in an insolvent condition, then conditions have arisen in which the directors are exposed to potential personal liability for the debts of the company.

To what extent need the directors be informed? The provision of financial information to the directors will usually be the job of the CEO. It is necessary, at very least, that:

- An annual budget be prepared and approved by the directors;
- Directors receive regular management accounts from the CEO, in which the performance of the company in the previous period is measured against budget;
- Management accounts are in a form that is understood by the directors;
- Directors ensure that the auditor is briefed promptly after each financial year-end and that they are kept informed by the CEO on the progress of the audit;
- Directors fully understand and agree with the draft audited accounts before signing them.

If the company should encounter a financial rough patch (and many arts organisations routinely operate close to the margin), it is of paramount importance that the situation be addressed openly and seriously as early as possible. Call in the auditors to help. Devise a survival plan. Consult with the company bankers and if necessary with the company creditors. If the company has a credible track record in its dealings and can demonstrate a plan to trade out of its difficulties, bank and creditors are often willing to provide the necessary support.

#### *Develop a sense of care about the business of the company*

It is not necessary for company directors to have any special qualifications. It is, however, necessary that they exercise care in taking decisions and in overseeing the business of the company. The law considers that members of the public dealing with a limited liability company are entitled to expect directors to take their functions seriously.

Any director who finds it impossible, for whatever reason, to pay attention to the affairs of the company, or who cannot develop a genuine sense of care about the organisation, owes it to the company to resign.

#### *Base decisions on what is best for the company*

Sometimes it is difficult to see the reasons why we favour a particular course of action. Habits develop. Directors may act as a rubber stamp for the wishes of the CEO. A strong chairman may stifle the opportunity for real debate. A good habit to develop is that of asking yourself questions such as these before giving support to a decision:

- Do I have enough information about this issue?
- Do I understand the pros and cons?
- What is the short-term/long-term benefit to the company?
- Is the proposal envisaged by the objectives of the organisation?
- Is it in keeping with the ethos of the organisation?
- Will it cause a conflict of interest?
- Does it compromise the company in any way?

This kind of process is very helpful in guiding directors to make decisions in the best interests of the company.

#### *Be honest at all times in your dealings concerning the company*

Honesty is probably the best protection against trouble, provided it is employed consistently, and not as a tool of last resort. Board members who are honest in their dealings are very unlikely to find themselves on the wrong side of the law. Honesty clearly involves the avoidance of dishonest practices or behaviour. Less obvious is the need to be open about possible conflicts of interest. A director must, for example, disclose a personal interest in any transaction of the company. A director may not use his or her directorship for personal gain without disclosing this to the board. A director should certainly absent himself or herself from any discussions about matters in which that director has a personal interest.

The directors must also be aware of the need for the company to avoid conflicts of interest. It may be necessary, for example, to be careful about 'hidden' conditions of sponsorship. Accepting a donation without being clear about the expectations of the donor is more than unwise. It is a recipe for trouble.

Honesty can be interpreted liberally. A board which consciously conducts its affairs in a clear, open and transparent way is not only likely to stay out of trouble, but will probably have lively board meetings and good relationships with the outside world.

## **Statutory duties**

The Companies Acts lay down rules concerning the administration and operation of companies. These rules, and the penalties for non-compliance, have been extended considerably in the last decade. They are quite apart from, and in addition to, the *general duties* of a director. They are very specific and must be strictly observed.

While the duties specified in the Acts are imposed in some cases on 'the company' and in others on either 'the directors' or the 'officers' of the company (which includes the secretary), since the Company Law Enforcement Act 2001, it is clear that:

*It is the duty of each individual director and the company secretary to ensure that the requirements of the Companies Acts are complied with by the company.*

This needs no elaboration. Moreover:

*An officer shall be presumed to have permitted a default by the company unless the officer can establish that he or she took all reasonable steps to prevent it.*

Accordingly, any failure by the company can be laid at the door of each of the directors and the secretary unless it can demonstrate that he or she actively attempted to prevent it.

The *statutory duties* can be summarised under these headings:

- The registered office
- Publication of company information
- Books of account
- The audit
- General meetings
- Company records
- Filing with the Companies Registration Office
- Disclosure of interests

### *The registered office*

Every company must have a registered office in the State. The location of the registered office must be notified to the Companies Registration Office within 14 days of incorporation, and any change must be notified within 14 days of the change.

### *Publication of company information*

Every company must have its name displayed on the outside of its registered offices. All company letters, notices, invoices and other stationery of the company must state its name in full (including the word 'Limited' or the abbreviation 'Ltd', unless permission has been given to dispense with the use of the word). The stationery must also show the names of the directors of the company; the place of registration (for example, Dublin, Ireland), the company number (the number allocated by the Companies Registration Office to the company on registration and shown on the Certificate of Incorporation), and the registered office.

### *Books of account*

Every company must keep proper books of account. What is meant by 'proper' in this context is described in the Companies Act 1990 in a way that can be summarised as follows:

*The books should correctly record and explain the transactions of the company; should at any time enable the financial position of the company to be determined with reasonable accuracy; should enable the directors to ensure that the accounts of the company comply with the Companies Acts; and should enable the accounts of the company to be readily and properly audited.*

The 1990 Act also sets out in some detail the information that the books of account should contain. While the Act is fairly easy to follow in this respect, it would be reasonable for the directors to expect the company auditor to give explicit advice about the setting up and keeping of the financial records. If the advice is followed, there should be no need to worry about the content of the Companies Acts.

Over and above the keeping of proper records, it is a specific duty imposed on the directors of a company to lay before the AGM of the company a balance sheet and a profit and loss/income and expenditure account for the financial year ending prior to the AGM of the company. These are normally contained in the audited accounts of the company.

### *The audit*

Every company must at each AGM appoint an auditor to hold office until the next AGM. The auditor must be properly qualified, and may not be a close relative of an officer of the company, or an employee of an officer of the company.

The financial statements of the company must be audited at least once a year. The auditor must report to the members of the company at the AGM. In the report, the auditor must state an opinion on a number of matters, including whether the company accounts give a true and fair view of the state of affairs and operations of the company.

Certain small companies are exempt from the requirement to have an annual audit. A company limited by guarantee does not however qualify for the exemption.

### **General meetings**

#### *Annual General Meeting (AGM)*

The company must hold an AGM within 18 months of incorporation, and thereafter at least once a year. Not more than 15 months must elapse between each meeting and the next.

The AGM is a meeting of members, but it is a duty of the directors to ensure that the AGM takes place. The directors are also obliged to participate, in that they must present the audited accounts of the company for the previous year to the members, and must deliver their 'directors' report'. This should contain an assessment of the performance of the company in the preceding year, an evaluation of the current state of its affairs, and the director's expectations for the forthcoming year. It should also state the steps that the directors have taken to ensure compliance with the requirement that the company maintain proper books of account, and the exact location of the books of account.

All members of the company, the auditor and the company officers should be invited to the AGM. At least 21 days notice of the meeting must be given, in writing. The notice period is presumed to mean 21 clear days, excluding the day of posting and the day of the meeting. With the notice convening the meeting, members should be sent the draft audited accounts which will be laid before the meeting, and the directors' and auditor's reports. This last requirement is honoured more in the breach than in the observance, but is nevertheless clearly stated at Section 159 of the 1963 Companies Act.

#### *The Extraordinary General Meeting (EGM)*

The EGM is also a general meeting, that is to say, a meeting of the members of the company. An EGM would normally be convened to deal with matters which require a vote of members, and which cannot wait until the next AGM. The directors are obliged to convene an EGM for the members, if requested to do so by members representing not less than one tenth of the total voting rights.

### *Company records*

The company must keep certain records. In the case of an arts organisation that is a *guarantee company*, these are:

- A register of members
- A register of directors and secretaries
- Minute books
- Directors' service contracts
- Register of members

The company must maintain a register of members, showing in relation to each member his or her name, address, the date when membership commenced and the date on which membership ceased.

A word of warning is appropriate here for those companies in which the roles of member and director are played by the same people. When a director retires or resigns in such companies, the cessation of the directorship is usually properly recorded, but the membership is often overlooked. If he or she remains on the books as a member of the company it can cause complications later, in addition to rendering inaccurate the annual returns to the Companies Registration Office.

The register of members should be kept at the registered office of the company, and be available for inspection by any member of the public, on request, during office hours.

### *Register of directors and secretaries*

This register should record the name, address, nationality, occupation and date of birth of each director and details of any other directorships held. While not strictly required, it is useful also to record the date of appointment and date of retirement or resignation.

In relation to the secretary, the register should record his or her name and address, and, where the secretary is a company, its name and registered office. It is useful to know that these registers (called 'company registers') can be obtained from good stationers.

### *Minute books*

Minutes of general company meetings, and of meetings of directors or committees of directors, must be kept in minute books. There is nothing magic about the 'minute book' itself. It can be a hard-backed book or a loose-leaf folder.

The Companies Acts do not prescribe the information that should be recorded in the minutes, and so companies have a free hand in this regard.

The Director of Corporate Enforcement has a particular interest in promoting the keeping of proper minutes, and the ODCE *Information Booklet No 1* contains recommendations concerning the content of the minutes. While these are very helpful, they favour the view that the minutes should incorporate an account of the views expressed by every person making a contribution to a discussion. Many organisations consider this impractical, and inadvisable, and prefer to record only the decisions taken at the meeting. Given the extent to which directors may now be called to account, some may find it reassuring to have their views recorded in this way. Others may feel it may make directors over-cautious about their contributions, and overly concerned about the phrasing of the minutes. It is a matter for each board to discuss and decide, and to instruct the minute-taker accordingly.

The book containing the minutes of general company meetings must be kept at the registered office and be open to inspection by members of the company during office hours.

Minutes of both members' and directors' meetings must be produced, on request, to the Director of Corporate Enforcement.

#### *Directors' service contracts*

Companies are obliged to keep, and make available to members of the company, a record of any contract of employment with a director. This should consist of a copy of the contract, if it is in writing, and otherwise, a written memorandum setting out the terms of the contract.

#### *Filing with the Companies Registration Office*

This is the rock on which many companies have, literally, perished. Every Monday, petitions are heard in the High Court from company directors seeking the restoration of companies which have been struck-off the register of companies, owing to failure to file the Annual Returns.

#### *Annual Return*

Every company must make an 'Annual Return' to the Companies Registration Office, at least once a year. This return, which is on a pre-printed form supplied by the Companies Registration Office, must contain certain information about the company, a list of the members of the company and particulars of the directors and secretary. There must be annexed to the return: the audited accounts of the company, and a certificate that the financial statements and the auditor's report submitted are true copies of those presented to the members of the company.

The rules involve the following procedure:

- Every company has an 'Annual Return Date' (ARD), notified to the company by the Companies Registration Office
- The Annual Return must be submitted to the Companies Registration Office within 28 days of the ARD
- The accounts that are submitted with the return must be made up to a date no earlier than nine months prior to the ARD.

The company will need to juggle the dates of the AGM, the ARD and the financial year-end of the company, so as to allow sufficient time for the preparation of accounts after the year-end, the holding of the AGM and filing of the Annual Return on time, taking into account that the accounts submitted to the AGM must be no more than nine months old at the date of the AGM, and accounts submitted with the return must be no more than nine months old at the date of the ARD. The optimum period of time between the company year-end and the ARD is nine months. If the gap between them is too short, the ARD may be changed.

For a company with a year-end of 31<sup>st</sup> December, the optimum ARD is the 30<sup>th</sup> September. The accounts can be prepared and audited in the period January to August, and the AGM can be held at any time prior to 30<sup>th</sup> September, once the accounts have been finalised. The company will have until 28<sup>th</sup> October to file the Annual Return.

Some companies file their own returns, but many now request their accountants to file on their behalf. It is important to be clear about who will undertake the task. The company accountants will not assume that it is part of their function. It should be agreed with them, and the position should be confirmed in writing.

Late filing penalties are heavy. €100 becomes payable on the day after the ARD, with €3 per day accruing thereafter, up to a maximum of €1,200 per return. In the event that a number of years' returns are outstanding, the late filing penalty is 'capped' at three years, i.e., €3,600.

The Companies Registration Office continues to strike-off the register large numbers of companies that have failed to file their Annual Returns. In the event that this should occur, the company effectively ceases to exist and its assets vest in the Minister for Finance. The company can be reinstated, but the process is costly. It can be effected by a Companies Registration Office procedure within a year of the strike-off date. Once a year has passed, it is necessary to bring a Petition in the High Court.

If the worst should happen, and the company is struck-off the register for failure to file the Annual Returns, it is important to address the problem as soon as it is discovered; the longer the delay, the greater the cost of rectifying the problem.

### *Special resolutions*

Certain acts of the company can only be performed on the authority of a special resolution of the members, in general meeting. These include changes to the Memorandum or Articles of Association or to the company name. A special resolution is not carried unless it receives the support of three quarters of the votes cast at the meeting. A printed copy of every special resolution passed by the company must be notified to the Companies Registration Office within 15 days of the meeting at which it was passed.

### *Changes in directors or secretary*

Any change in directors or secretary of the company must be notified to the Companies Registration Office within 14 days of the change.

### *Disclosure of interest*

When a director has a personal interest of any kind in a transaction involving the company, he or she is obliged to declare that interest to the other directors at a board meeting.

### *Penalties for failing to discharge the Duties of a Director*

In general, offences under the Companies Acts are of two types: more minor offences are tried in the District Court, and carry fines of up to €1,900, and/or 12 months imprisonment. More serious offences ('indictable offences') are tried in the higher courts, and are punishable with fines of up to €12,700, and/or five years imprisonment.

Offences involving dishonesty tend to be treated seriously. For example, improper or unauthorised deletion of an entry in a company register; making false statements to the company auditors; furnishing false information in purported compliance with the Companies Acts; destruction, mutilation or falsification of documents: all of these are regarded as indictable offences. Failure to keep proper books of account is subject to the same potential sanctions. At the most extreme end of the scale, fraudulent trading (in addition to exposing the director to personal liability for the debts of the company), carries a fine of up to €63,000 and/or seven years imprisonment.

### *'On the spot' fines*

Under the Company Law Enforcement Act 2001, the Director of Corporate Enforcement is empowered to impose 'on the spot' fines, for certain minor infringements.

### *Restriction and disqualification of directors*

Anyone convicted of an indictable offence in relation to a company is automatically disqualified from acting as a company officer.

The High Court has a discretion to disqualify a person for such period as it thinks fit if the person is found guilty of fraud, breach of duty, conduct that renders the person unfit to act or if he or she has committed two or more defaults in relation to the keeping of company accounts, or three or more defaults in relation to company duties generally.

Any director of a company that has gone into liquidation or receivership, and who is unable to satisfy the court that he or she acted honestly and responsibly as a director, will be restricted from playing any role in relation to a company for a period of up to five years unless certain conditions are met.

Anyone guilty of acting as a director while disqualified or restricted can, at the discretion of the court, be made liable without limit for the debts of the company, if it becomes insolvent within 12 months of that time.

The Registrar of Companies maintains a register of disqualified and restricted persons. This is open to inspection by any member of the public.

## **DUTIES OF THE COMPANY SECRETARY**

It is appropriate to add a few words at the end of this chapter concerning the role of the company secretary. Sometimes the role of the secretary is under-valued by the board members. In fact, it is vital that the secretarial function is carried out efficiently by someone who understands the job. Failure, for example, to ensure the filing of the Annual Returns can lead to the company being struck-off the Register of Companies, a situation that is expensive to rectify and that can have other, even more adverse consequences.

Every company must have a company secretary. One of the directors may act as the secretary. So also may the CEO, or another employee of the company. A company may act as secretary. The secretary is appointed by the directors.

No specific qualifications are needed for the position, but the directors are obliged to ensure that the secretary has the requisite knowledge and experience to discharge the duties associated with the role.

The principal functions of the company secretary include:

- Keeping minutes of meetings;
- Writing-up the company registers;
- Sending out notices convening meetings and other communications;
- Attending to the filing of the Annual Returns and other documents that need to be lodged in the Companies Registration Office;
- Keeping the company seal.

The company secretary is also expected to know every detail of the Articles of Association of the company, and to ensure that the directors follow the procedures laid down in the Articles, where applicable.

The company secretary is not only an administrative assistant. He or she is an officer of the company, and as such, is obliged to discharge some of the same legal duties as those imposed on the directors. Specifically:

- Certain company documents must be signed by both a director and the secretary;
- The secretary is obliged to disclose certain information for inclusion in the company registers;
- The secretary must exercise due care, skill and diligence in relation to his or her tasks, and can be held liable for loss due to negligence in this regard;

- Since the Company Law Enforcement Act, 2001, it is clear that the company secretary is equally responsible with the directors for compliance with the *statutory duties* of the company.

The ODCE has published an Information Booklet (Booklet No. 3) entitled *The Principal Duties and Powers of Company Secretaries*. The Registrar of Companies has also published an information leaflet (Leaflet No. 16) entitled *The Company Secretary*. Both of these are invaluable reading for every company secretary. However, helpful as they are, they do not contain enough information for a complete novice. Training in company secretarial duties is now provided by a number of institutions and is essential for anyone coming to the position for the first time.

## CHAPTER 6 THE BOARD AND THE CEO

### NATURE OF THE RELATIONSHIP

The quality of the relationship between the board and the CEO will have a bearing on the performance of the organisation.

A bad relationship will diminish the performance of the CEO. It will also rob board members of much enjoyment of their position. A good relationship, like any good partnership, will lay the ground for success and a sense of satisfaction in work well done.

*Is it possible to ensure that the relationship will be a good one?*

Probably not, but it is certainly possible to maximise the chances of success.

The one single factor that most often sours the relationship between board and CEO is a badly framed or badly understood boundary between their respective roles and responsibilities. This boundary also happens to be the line between 'governance' and 'management'. Interpreting it is not an exact science, but if the parties manage to start out in rough accord on certain principles, and are willing to engage with each other as they apply those principles, then the basis for a good relationship has been established.

It is for each organisation to devise its own solution as to where precisely the line should be drawn between the powers and duties of the board and those of the CEO. However, there are some touchstones. The constitution of the company will normally charge the board with responsibility for 'management' of the business of the organisation. This is 'management' in a wide sense - 'governance' in current parlance. This governance role is the preserve of the board. The board may delegate aspects of the role to the CEO, but it cannot abdicate responsibility for the 'governance' of the organisation. It is 'management' in a different sense that is the role of the CEO.

These guidelines (based on text in Mike Hudson's *Managing Without Profit: The Art of Managing Third-sector*, 1995 Penguin Books, page 42) may be helpful:

*Governance is the responsibility of the board. It is about ensuring that the organisation has a clear mission and strategy, but not necessarily about developing it. It is about ensuring that the organisation is well managed, but not about managing it. It is about giving guidance on the overall allocation of resources, but is less concerned with precise numbers. Governance is about taking responsibility for the performance of the organisation, but not about meddling with the detail of the performance measurement system. Governance is ultimately concerned with providing insight, wisdom and good judgment.*

While, on the other hand:

*Management is an executive responsibility. The executive is responsible for implementation of strategy agreed by the board. It is an executive responsibility to turn the intentions of the board into action, and to administer the systems and procedures needed to get results. In practice, this includes fleshing out the details of strategies and policies agreed by the board, as well as helping to ensure that the mechanics of the board process run smoothly.*

## **RECRUITING A CEO**

This is an important task for the board. The process of selection should be planned in some detail. The board should decide at the outset whether it will handle the selection process itself, or will seek expert assistance. A detailed job specification should be drafted, after a thorough consideration of the needs of the organisation.

The steps in the recruitment process should be settled, as well as their timing and the board members who will participate. A committee of the board may be appointed to carry out the task; if so, the way the committee will report to the board should be decided.

Steps in the process will include:

- Advertising;
- Short-listing applicants for interview;
- Interviewing;
- Making a selection;
- Agreeing terms with the successful applicant;
- Reflecting those terms in a contract.

Employment law prohibits discrimination. The organisation should be careful to ensure that it avoids this pitfall in advertising, in drafting application forms, and in interviewing. Be especially careful around issues such as age, religion, race, disability, marital status, and sexual orientation. It is helpful to focus, not on the type of person you are seeking, but on the skills and qualifications necessary for the task. For your protection in case of a later dispute, a person should be nominated by the interview board to take detailed notes of interviews and record the basis on which decisions are made.

## **CONTRACT OF EMPLOYMENT**

By law, certain information concerning the terms of employment must be given in writing to every employee. While a letter containing these terms may be sufficient for many employees, a full contract of employment, drafted by the organisation's solicitor, is more appropriate in the case of the CEO.

It is wise to take the advice of the organisation's solicitor before the final interview with a successful applicant. There are important issues that have certain legal implications, such as whether the appointment should be for a fixed term, and how long that term should be. The board should understand these before making an offer of employment.

## **AMBIT OF AUTHORITY OF THE CEO**

While the organisation's solicitor will guide the board on the contents of a suitable employment contract, it is for the board to decide on the ambit of authority of the CEO. It does this on the basis of its understanding of how the line between 'governance' and 'management' can best be drawn in the unique context of its own organisation.

This issue should be discussed openly and thoroughly with the successful applicant. The remit of a CEO is often described for contract purposes as ‘managing the day-to-day business of the organisation, subject to the overall control and direction of the board’. It is wise, to the extent possible, to be more explicit. ‘Management’ cannot be completely defined, but areas of importance can be identified and both parties can articulate their expectations in relation to them. The understanding that results should, as far as possible, be reflected in the CEO’s contract. It may be useful to incorporate the suggestions made below in the section **REPORTING TO THE BOARD**.

## **POLICY AND THE CEO**

Determining policy is a central function of the board. In many organisations the CEO is directly involved in policy-making, especially where artistic policy is concerned. The board may be happy to permit this, indeed may depend on the CEO to suggest policy in certain areas.

Certain warnings however are appropriate:

- All policy must ultimately be directed towards fulfilling the stated aims of the organisation. Any fundamental change in direction needs to be addressed as a potential alteration to the constitution.
- Even though the board may delegate to the CEO, at the end of the day the board must take responsibility for the organisation’s policies. It is inappropriate, therefore, for the board to delegate any policy-making function absolutely. Board approval of all policy, at least in principle, is desirable.

This is usually a matter of finding the right balance, taking into account the skills of the board on the one hand, and the qualifications and experience of the CEO on the other. The ideal would be a board and CEO in lively open discussion about policy, with the board leading in certain areas and the CEO in others, and, while understanding that policy is ultimately a board responsibility, arriving at most solutions by agreement.

## **DIRECTING AND SUPPORTING THE CEO**

When the ambit of authority of the CEO is settled and understood, and equally when an area of policy-making has been delegated to the CEO, the CEO should then be allowed to manage that brief without interference from board members.

This is not to say that the CEO should be left without direction and support from the board. Board meetings will normally provide sufficient discussion and decision-making to guide, support and direct the CEO.

Between meetings, the CEO and the chairperson will often work at ‘fleshing-out’ board decisions. The chairperson will act as a sounding-board and general support for the CEO, and will expect to be informed of any crisis or unusual problem concerning the day-to-day business of the organisation.

It is important that the chairperson is able to provide this support without interference in the management role, and without inhibiting or undermining the authority of the CEO.

In an arts organisation, there is often an extra dimension to the board/CEO relationship. The board will probably include persons who have been chosen for their particular area of expertise. The CEO

may reasonably expect these board members to make themselves available, as the need arises, to advise the CEO.

## REPORTING TO THE BOARD

The way in which the CEO reports to the board is another matter that should be explored in advance, so that practices can be settled and understood by both parties:

*Clear, regular financial reports are essential. At minimum, an annual budget should be settled before the beginning of each financial year by the CEO, and approved by the board. Monthly management accounts should be prepared by the CEO/Chief Finance Officer and furnished to board members, in time for the board to consider them before the next board meeting. The board should be able to measure the performance of the organisation against budget, at regular intervals throughout the year.*

It is helpful to have the format of financial reporting approved by the organisation's accountant. Whether or not this is done, it is imperative that the board understands the way in which the figures are compiled.

It is not possible to be definitive about all matters which the CEO should bring to the board table (as being issues affecting 'governance'), and those which the CEO may handle without reference to the board (being issues of 'management'). It is possible however, to agree guidelines. It may be wise, for example, to agree that issues such as the following should be referred to the board:

- Anything that involves an unexpected or unforeseen claim against the organisation, or its funds;
- Any dispute between the organisation and a third party;
- Any significant disagreement, or difficulty with an employee;
- All matters concerning insurance;
- Anything affecting the ownership of property or any other valuable asset of the organisation;
- Anything that might threaten the reputation of the organisation;
- All non-routine correspondence with the organisation's bank, accountants or solicitors;
- Matters concerning grant-aid and donations;
- Anything that would involve a significant change in an established policy, plan or practice of the organisation.

The CEO will also be expected to keep the board informed, in a general way, about the activities of the organisation, its significant successes and failures.

## CEO AS COMPANY SECRETARY

When the organisation is a company, the CEO often acts as company secretary. Opinions differ as to whether or not this is a good idea. Against the proposition is the fact that the CEO is an employee of the company, answerable to the board. As the secretary is an officer of the company with legal duties very close to those of a director (see **CHAPTER 5**), this places the CEO in the awkward position of being at the same time the servant of the company and one of the masters of it. It can be argued that it is unfair to expect the CEO to carry out a role that is essentially quite different to that of CEO and that may at some point give rise to a conflict of interest.

However, the CEO is in many ways the obvious person for the job of company secretary, and many arts bodies opt for this solution. It is supported by modern business thinking, which also suggests that it is appropriate for the CEO to carry this responsibility.



