



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



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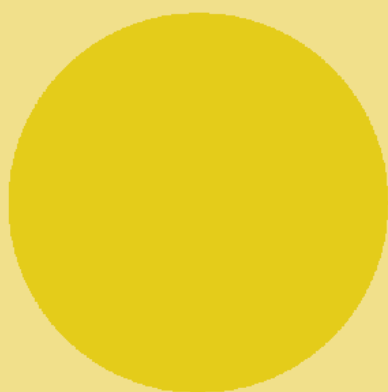
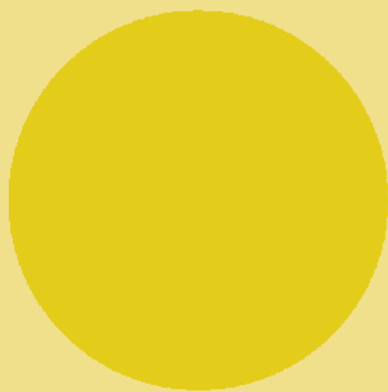
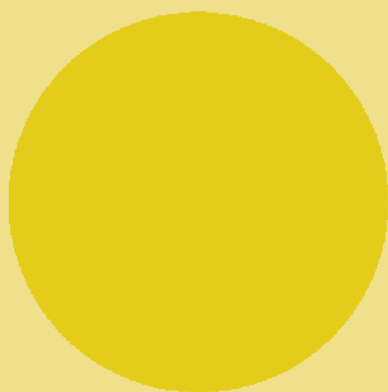
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## Disclaimer

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.



## INTRODUCTION

This publication is a revised version of *A Practical Guide for Board Members of Arts Organisations* originally published in 2006 by The Arts Council.

The publication incorporates recent and current changes in legislation, particularly through the Companies Act 2014 and establishment of the Charities Regulatory Authority under the 2009 Charities Act. Readers should be aware that the revised publication has required, in some areas, a substantial rewrite.

Arts organisations range in scale and complexity from voluntary groups organising festivals and events to incorporated organisations operating on a national scale. While the levels of accountability and transparency demanded of all these organisations vary, the principles of a well-run organisation are very similar.

Hence, this publication sets out to inform art organisations on how to comply with legislative demands in a non-technical and readable format. At the same time, it advises companies and groups on how to organise their governance in a manner which serves the arts efficiently and effectively.

Arts boards are typically made up of artists and business people. Members are usually people of considerable expertise in their own right. 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 to fill this gap.

**June 2015**



## LEGAL STRUCTURES

### Advantages of a formal structure

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When people come together to pursue a common goal, they may initially order their affairs in an informal way. However, without some formality about aims and procedures, there will be no clear reference points to guide decision-making. This uncertainty is likely at some point to become a problem, highlighting the need for rules to govern internal processes. Moreover, as an organisation grows and transactions become more complex, members tend to become concerned about their personal responsibility for its activities. The knowledge that certain legal forms provide limited liability often drives a group to seek a formal legal 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.
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### Ideas about structure

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When a group decides to adopt a formal structure, some members may favour a particular concept. This may be an association, a co-operative, a trust or a company. Often, what lies behind the preference is an idea or an aspiration, rather than a desire for a particular legal form. The choice of company is the most common one, often based on the business experience of some of the members. It is worth exploring members' ideas before making a decision as to structure. Some shared – or contested – beliefs may emerge that may influence either the choice of legal form or the way in which it should be configured.

### The “non-profit”

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A question fundamental to the establishment of an arts organisation is whether it is to be constituted as a “non-profit”. The phrase simply means that any profit made will be reinvested in the organisation, rather than paid out to its members.

### Legal Structures

In general, it will be necessary for an arts body that intends to be regularly funded wholly or in part by grant-aid or voluntary donation to be constituted as a non-profit. This is because an organisation that pays dividends to its promoters is unlikely to secure funding support.

Of course, this is not to diminish the profit motive of many commercial arts enterprises. It is important, however, to be clear about the question. It goes to the root of the nature of the organisation and will determine its legal form. It should also be clear that non-profits generally prohibit payments (other than expenses) to those who are involved in their governance. An organisation formed by a small number of people with the principal aim of generating salaries for themselves can expect that it will be precluded from most types of grant-aid. It will also find that it cannot obtain charitable status for tax purposes.

The non-profit can be distinguished from the “charity”, in that it is a broader category. While charities are by definition non-profits, a non-profit can be constituted for aims that are not necessarily charitable as defined in law. There is a degree of convergence of the two categories as a result of the Charities Act 2009. This question and the question of charitable status for tax purposes are explored further in Chapter 3.

This publication is primarily addressed to non-profits, although it may be of use in some respects to commercial arts ventures too.

### Choice of structure

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Although it is not the only option, by far the most common legal form adopted by arts bodies is the limited company. A minority of organisations is constituted in one or other of the alternative forms explained briefly below. Among the different forms, 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 and directors 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.

Whereas 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 appropriate.

Before looking at the range of possible structures, let us touch briefly on the most popular choice, the limited liability company – discussed in more detail in Chapter 2.



## The company

The laws governing the creation and operation of companies in Ireland are contained in the Companies Acts. Recently, the Acts have been reformed and consolidated into a single piece of legislation, the Companies Act 2014<sup>1</sup> (“the Companies Act”).<sup>2</sup>

Among the many advantages of the company structure are that:

- it grants separate legal status to the organisation.
- the liability of the members is limited, meaning that they are, with some exceptions, not personally liable for the acts of the company.
- it is the most common vehicle for doing business, and most people are familiar with it.
- 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.

## The “guarantee company”

Most arts organisations in Ireland that receive public subsidy are incorporated as companies limited by guarantee without a share capital.<sup>3</sup> It is the company form most suited to a non-profit venture, and as such is the preferred vehicle for recipients of Arts Council subsidy. The company limited by guarantee without a share capital is discussed in more detail in Chapter 2.

## The “designated activity company” (DAC)

It should be mentioned that the Companies Act has introduced a new form of limited company called the designated activity company (or “DAC”). It may also be a guarantee company, but with a share capital. As a share capital is rarely appropriate in a non-profit context, it will not in general be a suitable structure for an arts organisation.

## The unincorporated association

An organisation may not have reached the point of deciding that a formal structure is needed, or it may choose to adopt a written constitution or set of rules, as a minimal way of introducing formality in the organisation. In both of these cases, the entity is, from a legal perspective, an “unincorporated association of members”, in which all of the members are collectively responsible for the acts of the group. If a constitution of some kind is adopted, it will normally describe the objectives of the organisation, and will provide rules about membership, and decision-making. This constitution will facilitate the workings of the organisation, but will not change its legal status.

This option does not provide either separate legal status or limited liability for members. Anything done by the association is done by all its members, and they are personally liable for its obligations.

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<sup>1</sup> The status of the Act at the date of publication.

<sup>2</sup> The Companies Act was signed into law on 23 December 2014, and formally commenced on 1 June 2015.

<sup>3</sup> Exceptions to this include companies organised on a commercial basis which receive funding on a project basis.

### Legal Structures

While this is an obvious disadvantage when the association trades, enters into contracts and so forth, many small organisations, such as festival committees, operate successfully in this way for long periods.

#### The trust

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

Trusts are often created to administer a donation. As such, they tend to have a static purpose and, outside of the founding context, they can be inflexible instruments for an evolving arts organisation. The terms of the trust deed can be difficult or even impossible to alter. Trustees, once appointed, can be very difficult to remove. The law of trusts is arcane and complex; if problems arise, recourse to the courts may be the only solution.

There are, however, circumstances in which the trust has been found to be an appropriate vehicle to fulfil an arts objective. Dublin City Gallery The Hugh Lane was at one time an excellent example. Sir Hugh Lane bequeathed his art collection to Dublin Corporation (now Dublin City Council) 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. The trust can be seen here in context: it set out to provide neither independent legal status nor rules for the running of the organisation. It was simply an effective method of safeguarding the assets and directing the way they were to be used.

Trusts are sometimes created for this purpose by organisations primarily constituted in some other form. For example, a limited company or an unincorporated association of members may establish a trust for the holding of a property interest.

Although a trust does not have separate legal status, an application can be made by a charitable trust to the Charities Regulatory Authority to become a body corporate under a special scheme provided for in the Charities Act 1973<sup>4</sup>. There are very few such bodies, but there are some arts organisations among them.

#### Other options: the friendly society, or the industrial & provident society

These are two forms of registered structure introduced by legislation enacted in Victorian times, but which is still in force. We refer to them here because a small number of arts organisations are on the respective registers (i.e. of Friendly, Industrial or Provident Societies), which are maintained by the Companies Registration Office.

The friendly society was designed to facilitate voluntary charitable relief. While an arts body may register as a friendly society, the form has limited appeal, as it provides neither separate legal status nor limited liability for its members.

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<sup>4</sup> The Charities Act 1973 is still in force. The role of the Commissioners of Charitable Donations and Bequests for Ireland under the Act has been transferred to the Charities Regulatory Authority.

## Legal Structures

The industrial & provident society was designed in the nineteenth century to meet the needs of the co-operative movement. As a rule, co-operatives are trading associations that do business principally with their own members. The industrial & provident society provides both separate legal status and limited liability for members. There are half a dozen societies registered whose principal objectives centre on *arts, cultural and heritage* activities. They include a graphic arts co-operative and a couple of arts-related festival societies.

### The statutory body: a special category

In order to give a full picture of the range of institutional structures for arts organisations, it is worth touching briefly on that kind of arts organisation which has been established by legislation, i.e. the statutory body. The structure and constitution of these arts organisations have been determined, not by the choice of those involved in the organisation, but by the statutes under which they were established.

A number of our national cultural institutions are statutory bodies, each with its own unique structure. The Arts Council was established by an Act of the Oireachtas of 1951, augmented in 1973 and updated in an Act of 2004. Its members are all appointed by the Minister responsible for the arts. The National Gallery of Ireland was originally established by an Act of 1854 and is currently regulated by the National Cultural Institutions Act of 1997. It has a Board of Governors and Guardians, whose members are likewise appointed by and answerable to the Arts Minister. The National Library of Ireland, the National Museum of Ireland and the National Archives of Ireland are also statutory bodies.

By contrast, other national cultural institutions including the Irish Museum of Modern Art, Crawford Art Gallery and the Abbey Theatre are constituted as companies limited by guarantee.

### Hybrid structures

There is nothing to say that an arts organisation must be restricted to a single institutional form. A commercial entity may establish a non-profit vehicle for an arts purpose, for example. The reverse can also be the case, with a non-profit company establishing a commercial arm, which it controls. Companies also establish trusts for particular purposes, normally in connection with the holding of property interests.

## **SUMMARY**

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In this chapter, we have described the range of institutional structures that are available to people wishing to formalise a structure for their arts activities.

Although the guarantee company (discussed in more detail in the next chapter) is by far the most popular structure, and the one preferred for funding purposes by the Arts Council, it is not the only one in use, and for that reason we have touched on the main features of the unincorporated association; the trust; the friendly, or industrial & provident society, and the statutory body – although only government has the power to create the last of these.

## INSIDE THE GUARANTEE COMPANY

The company limited by guarantee without a share capital (“the guarantee company” or “the CLG”) is by far the most common legal form of non-profit arts organisation, and is the Arts Council’s preferred structure for arts organisations in receipt of annual funding.

The essential features of this type of company are that:

- it enjoys the usual advantages of incorporation, including limited liability and separate legal status.
- it is normally constituted so as to preclude the distribution of profits to its members.
- on the winding-up of the company, the members promise to pay a nominal sum (often €5) towards the obligations of the company. This guarantee of payment gives the guarantee company its name.

The guarantee company has a particular internal structure, which is not always well understood. It is useful therefore to explore how the company works in practice. Before doing so, however, it is necessary to explain some changes to the law introduced by the Companies Act 2014 (“the Companies Act” or “the Act”). These will affect both existing guarantee companies and those incorporated after the introduction of the Act.<sup>5</sup>

### The Companies Act

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The Companies Act was designed to simplify company law and to consolidate in one Act all earlier pieces of company legislation. It contains a general set of rules which are created as a standard, and apply automatically to all private companies limited by shares. It then deals individually with other types of company and applies some, but not all of the same rules, depending on the type of company. In other words, some of the general rules are *disapplied* for certain types of company, including the guarantee company. The following are key changes affecting the guarantee company:

- The company limited by guarantee must now, instead of putting the word “limited” or the abbreviation “Ltd” after its name, use the phrase “a company limited by guarantee” or the abbreviation “CLG”.
- Although previously a guarantee company required at least seven members, it now requires only one. This is a significant change and removes the need for some organisations to look for persons with no real interest in the company to act as “stand-in” members for establishment purposes. There is no upper limit to the number of members a CLG may have. Two directors and a company secretary are required, as previously, although directors can be drawn from the membership, and one of the directors can act as company secretary.
- While some company forms in the new regime will no longer have either a memorandum of association or articles of association, the CLG will continue to have both. They will, however, be contained in one document, which will be called its “constitution”.

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<sup>5</sup> The Act came into effect on 1 June 2015

## Inside The Guarantee Company

- The Companies Act creates a substantial number of “default” governance provisions which will be applicable unless specifically excluded or amended in the company’s constitution. Note that, subject to a some exceptions, the memorandum and articles of association of existing guarantee companies will continue in force. Most companies will however take the opportunity to review their constitutional documents, to ensure they are aligned with the Act in a way that suits them.

### The roles of member and director: understanding the difference

As noted above, while the directors of a CLG may be drawn from the membership, the roles of member and director in the company are not interchangeable. To appreciate the way in which the company works, it is important to understand the difference between them.

In theory, all power in the company originates with the members. When the company is formed, these are the promoters: those who establish the company, although of course over time, they may be replaced or joined by others. By delegation of power by the members, the board of directors is authorised to conduct the business of the company. The directors normally have a wide ambit of authority, but they exercise their powers on behalf of the members and are accountable to them.

It is for this reason that company law provides that certain fundamental decisions regarding the company can only be made by the members. These fundamental powers include making any alterations to the constitution of the company and changing the name of the company.

The members therefore have certain high-level powers, some of which cannot be delegated. These powers are not often exercised. Indeed, members are often unaware of them. 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.

It can be deduced from the above that the guarantee company has two forums for decision-making – the members’ meeting and the directors’ meeting. The high-level role of the members, and the fact that the directors are answerable to them, give the members a degree of oversight of the activities of the directors. This is acted out at least annually at the AGM, when the directors report to the members on their stewardship in the preceding year, and when the members elect or re-elect directors in place of those retiring.<sup>6</sup>

When a guarantee company is being formed for an arts purpose, 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 will share equally the responsibility for all decisions, they may all act both as members and directors. Where there is a large group involved, it can be practical for all of them to act as members, electing a smaller number to serve as directors.

While there is nothing wrong with the same group of people acting as both members and directors, it can lead to the distinction between the roles of member and director becoming blurred. This can cause problems. For example, members’ meetings, which must be called in

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<sup>6</sup> This is the case in most, but not all guarantee companies. In some, the directors are appointed by nomination, or in some other way.

### Inside The Guarantee Company

a particular way, may be improperly called or conducted, casting doubt on decisions made at those meetings. Perhaps more importantly, it results in the loss of the supervisory role that the structure permits members to play, overseeing, even if only on an annual basis, the activities of the directors.

A company is obliged to keep a register of members and a register of directors and secretaries. It is important that this is not overlooked. In cases where members and directors are the same people it can happen that when a person resigns or retires as a director, he or she remains on the register of members. Over time, failure to keep the registers up to date can result in confusion about who are, in fact, the members of the company, entitled to attend and vote at a general meeting. It is the responsibility of the company secretary to maintain the register of members up to date, and it is prudent to review this list annually in the context of preparing for the annual general meeting.<sup>7</sup>

## The constitution of the company

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The constitution of the guarantee company consists of its memorandum and articles of association. As mentioned above, the Companies Act now requires that these be contained in one document, called its “constitution”.

### The memorandum of association

The Companies Act specifies that the memorandum of association of a CLG must contain the following information:

- its name;
- that it is a public limited company;
- its objects;
- that the liability of the members is limited;
- that each member undertakes to contribute a nominal sum in the event that the company is wound up during his or her membership, or within a year thereafter.

The memorandum of association can be seen as the mission statement of the organisation. The objectives contained in the memorandum express the aims that will guide the work of the organisation. 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).

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<sup>7</sup> Additional information about the keeping of company registers is outlined in Chapter 6.

## Inside The Guarantee Company

### The articles of association

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 the internal workings of the company. They comprise the rule book of the organisation. In company law they are described as the “regulations” of the company.

A standard set of articles for an existing guarantee company will cover these matters:

- membership of the company;
- the holding of members’ meetings;
- voting and other procedures for members’ meetings;
- appointment and retirement of directors;
- the powers and duties of directors;
- procedures at directors’ meetings;
- the keeping and auditing of accounts;
- the role of the company secretary.

The Companies Act has made a significant change concerning articles of association. Instead, as previously, providing a template of optional provisions which could be tailored as necessary, the Act contains some 87 statutory defaults which will apply, unless modified or excluded. At the same time, considerable freedom is given to CLGs to design their own rules.

The provisions can be summarised as follows:

- The articles of association “may contain regulations”. This allows the CLG to adopt any type of regulation it wishes to apply to its governance, as long as it is not illegal, or does not contravene a mandatory provision of the Act.
- As long as the articles of the CLG do not exclude or modify an “optional” provision in the Act, that provision will apply. So, to take an example, the Act specifies that unless the constitution provides otherwise, one third of the directors of the company shall retire by rotation at every AGM, but retiring directors shall be eligible for re-election.
- Subject to the mandatory requirement that articles of association must state the number of members with which the company proposes to be registered, they may simply state that the provisions of the Act are adopted, in which case all of the optional provisions will apply. Although these provisions are very similar to those found, albeit with some variation, in most company articles, it is unlikely that this option will be availed of by many companies. Having a specific, tailored set of articles to hand for reference purposes is clearly preferable to placing reliance on far less accessible statutory provisions.
- In the case of a company registered before the commencement of the Act, the existing memorandum and articles will continue in force, subject to any mandatory provision in the Act, and to the requirement that the company must, within 18 months of commencement of the Act, change its name to include the phrase “company limited by guarantee” or the abbreviation CLG.<sup>8</sup> While this provision provides comfort for existing companies, they may wish to adopt some of the new default provisions, for example, the ability to hold meetings by conference call, which may not be in their existing

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<sup>8</sup> In the event that the company fails to change its name, it will be deemed to have done so 18 months following commencement of the Act. The failure will, theoretically at least, be a default.



articles. For new companies, the drafting of the articles will require knowledge of the new provisions, so as to ensure that the articles are in conformity with them.

## The powers of the directors

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The role of the directors is described in the Articles, almost always in a cumbersome formula of words originally set out in the Companies Act 1963, to which some changes have been made by the new Act. The provision is optional, and a default rather than a mandatory one, but as “the foundation stone for the directors’ powers of management and delegation”, it is hugely important.<sup>9</sup> As set out in the Act, it is as follows:

“The business of the company shall be managed by its directors...who may exercise all such powers of the company as are not by this Act or by the constitution required to be exercised by the company in general meeting, but subject to:

- (a) any regulations contained in the constitution;
- (b) the provisions of this Act; and
- (c) such directions, being not inconsistent with the foregoing regulations or provisions, as the company in general meeting may (by special resolution) give.”

Decoded, this provision defines the balance of power between members and directors. The Board manages (although the preferred term in business terminology is “governs”) the business of the company, but subject to directions which may be given by the members by special resolution in a general meeting of members, and also subject to the power to control the constitution that the members enjoy by law and which cannot be removed from them.

The directors can therefore be overruled by the members, although it should be said that this rarely occurs. Note that for the first time, the Act provides that a special resolution (of at least 75% of votes cast at a members’ meeting) is required.

## The suitability of the guarantee company as a structure for arts organisations

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A common difficulty encountered in the use of the guarantee company by non-profit organisations is that the constitutional documents are often couched in dense legal language, are not clearly understood.

People involved in promoting a project often decide to incorporate, in order to obtain limited liability. Once incorporated, the members and directors must come to terms with the essential company duties of holding the AGM, reporting to the Companies Registration Office and complying with the other provisions of company law. At this point, the company is functional, and provides the benefits of limited liability as well as separate legal status.

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<sup>9</sup> *Bloomsbury Professional’s Guide to the Companies Act 2014*, General Editor Dr. Thomas B. Courtney, Bloomsbury Professional Ltd., 2015

## Inside The Guarantee Company

The underlying relationship between members and directors, and the mechanics for decision-making, may, however, be poorly understood. Drafting of the memorandum and articles of association may have been given scant attention, and the constitution of the company may not reflect how the company operates in practice.

There are many non-profits – including arts organisations – that have failed to provide adequately in their constitutional documents for their actual operational requirements, or that have suffered from the effects of governing in a way that is not aligned with the provisions of their memorandum and articles of association. These risks arise most often when insufficient attention is paid to the drafting of these in the first instance, and to maintaining them under periodic review as the organisation grows and changes over the course of its life.

Of course, looked at from the perspective of a small arts production company whose founder is still its artistic director, for example, or an artists' studio company that evolved from an ad hoc arrangement, the provisions of company law may seem quite remote from their objectives as arts businesses. The truth is that company law was never designed to meet the needs of non-profit bodies. It is, and remains necessary, despite recent changes to company law, to actively make the best of the structure.

### Making the best of the guarantee company

Whether or not the guarantee company structure is ideal, it is the standard legal form for non-profit organisations and is the preferred structure of statutory bodies such as the Arts Council. To make the best of it, the following advice may be helpful:

- **Pay particular attention to the drafting of the company constitution**  
Whereas sample company documents may be available, for example, by the Revenue Commissioners,<sup>10</sup> it is important, and even more so since the introduction of default provisions in the Companies Act, that the organisation should have expert advice to help tailor the company's memorandum and articles of association to its particular character and requirements. This need not be prohibitively expensive, since much of the work of deciding what is required should fall to the members.
- **Circulate copies of the constitutional documents**  
Copies of the memorandum and articles of association should be given to every director and secretary of the company on their appointment, and should be made available to members on request. A link to these documents in a "governance" section of the company website is strongly advised. It demonstrates transparency, and that attention is paid to governance in the organisation. Time should also be devoted to making sure that every board member and key employees are familiar with, and understand, the documents.

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<sup>10</sup> See <http://www.revenue.ie/en/business/charities.html> for Standardised Memorandum and Articles of Association for a Company Limited by Guarantee and Seeking Tax Exemption as a Charity Under the Provisions of Section 207, Taxes Consolidation Act 1997.

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- **Use the company constitution in the work of the organisation**

When the company is incorporated, it is up to the organisation to adapt itself to the framework which the constitutional documents provide. If the drafting has been done with care, and everyone is familiar with the constitutional documents, they will provide an essential reference point for certain key decisions in the organisation. The articles will clarify, for example, who can be a member of the company and how members are admitted; how directors are appointed and removed; the ambit of authority of the Board; notice period for members' meetings; voting entitlement at meetings, and so forth.

- **Attend to the maintenance of the company**

A company is an organic entity. The annual review of its financial health – the presentation of financial statements to the AGM – should be seen not merely as legal compliance, but as an opportunity for members and directors to conduct a wholesome review of the company's performance over the preceding year, to assess its financial situation, to elect or re-elect directors and a company secretary in place of those retiring, and to anticipate what the next year may bring.

It is fruitful to see the structure as something flexible. Neither the memorandum nor the articles of association are set 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 constitutional documents helps to keep them fit for purpose and in step with the activities of the organisation.

## SUMMARY

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The company limited by guarantee without a share capital is the most common institutional form adopted by Irish arts organisations. This chapter sets out the main features of the guarantee company in terms of its formation; the different roles of member and director; the suitability of this type of company for arts organisations and how to make the best of the structure it provides. It touches on the powers and responsibilities of directors, and the need for directors to be attentive to the company's constitution, and keep it under regular review.

## THE ARTS ORGANISATION AS A CHARITY

While some arts organisations have been granted “charitable status” by the Revenue Commissioners, they tend not to think of themselves as “charities” in any other sense of the word. However, by virtue of the Charities Act 2009 (commenced in October 2014) many arts bodies will be subject to a new regulatory regime, because they fall within the definition of “charitable organisation” in the Act. Organisations that have already secured charitable status from the Revenue Commissioners will be deemed to be charitable organisations and entered automatically on a register of charities. Others are required to register if their purposes fall within the parameters of the definition set out in Section 3 of the Act.

To understand the way in which arts organisations are affected by the new legislation, it is necessary first of all to separate the concept of “charitable status” for tax purposes from the meaning of “charitable organisation” as defined in the Act. One would expect that they should apply to or affect the same organisations, but this is not necessarily the case.

### Charitable status

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This confers an attractive package of tax benefits on an arts body. It is obtained on foot of an application to the Revenue Commissioners. To be eligible, an organisation must have objects which are judged by the Revenue Commissioners to be “charitable”. This means that the organisation’s “governing instrument”, which in the case of a company limited by guarantee is its memorandum of association, must, in the opinion of the Revenue Commissioners, disclose that the organisation has been formed on a not-for-profit basis, and for one of the following purposes:

- the relief of poverty;
- the advancement of education;
- the advancement of religion;
- other works of a charitable nature beneficial to the community.

Many arts bodies are accepted as meeting this requirement. Some have tailored their constitutional documents to describe their activities in language which makes it more likely that they will qualify.

There are additional requirements, including the following: the governing instrument must state that no member of the governing board may be employed by the company, or remunerated for acting as such; it must provide that if the organisation is wound up, any surplus assets will be transferred to another charitable body; it must say that the constitution will not be altered without the permission of the Revenue Commissioners, and that the organisation will furnish its audited accounts to the Revenue Commissioners upon request<sup>11</sup>.

When the Revenue Commissioners approve an application for charitable status, the organisation is granted a reference number, known as a “CHY number”.

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<sup>11</sup> It should be noted that at the time of publication of these Guidelines, the Revenue Commissioners have not notified any changes to their requirements for granting charitable status, following the commencement of both the Charities Act and the Companies Act 2014. This situation may change.

## Tax reliefs

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Organisations with a CHY number may claim exemption from the following types of tax:

- Income Tax
- Corporation Tax
- Capital Gains Tax
- Deposit Interest Retention Tax
- Capital Acquisitions Tax
- Stamp Duty, and
- Dividend Withholding Tax

Note that the exemption does not extend to liability for VAT.

## Relief on donations

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Charitable status also allows organisations to be designated as “eligible charities” or “approved bodies” in respect of donations. To qualify as an “eligible charity”, an organisation must have held a CHY number for at least two years and must apply to the Revenue Commissioners in a prescribed form. The term “approved bodies” refers to a list of organisation types, including “a body approved for education in the arts”.

Under the scheme applicable to donations made after 1 January 2013, the effect of the designation is as follows:

- In the case of a donation to the organisation by a company, it is treated as a tax-deductible item. So, a donation of €1,000 effectively costs the company making the donation only €875, assuming it pays Corporation Tax at the rate of 12.5%.
- In the case of a donation by an individual, the organisation may obtain a direct payment from the Revenue Commissioners. If a donation of €1,000 is made, it is grossed-up by a fixed rate of 31%, to €1,449.27. On the assumption that the donor pays at least this amount in income tax, the organisation can claim the same amount from the Revenue Commissioners following the end of the tax year, provided the donor has made his or her tax return.

To qualify, a cash donation must have a minimum value of €250 and a maximum of €1 million in any single year. The donor must be willing to disclose the donation to the Revenue Commissioners and to complete a prescribed form.

## The Charities Act

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The purpose of the Charities Act is to regulate charitable organisations, to make them more publicly accountable and transparent. A new range of reporting and other obligations will apply to qualifying organisations, and they will be subject to sanctions for non-compliance.

The Charities Regulatory Authority (CRA) was appointed on 16 October 2014 to oversee the implementation of the new regime. A centrepiece of the regime is the Register of Charities, a publicly accessible database of extracts of the information which charitable organisations are obliged to provide to the Regulator.

The question for arts bodies is whether or not the Act applies to them, and, if so, what new obligations this implies.

Before looking at the qualifying criteria, note that the Act makes it clear that its provisions do not affect the question of eligibility for exemption to pay tax. So, while the organisation is assumed to come within the Act if it has charitable status with the Revenue Commissioners, the reverse is not the case: being on the Register of Charities does not entitle the organisation to charitable status for tax purposes.

## Which organisations are affected?

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The Act applies to all organisations falling within a definition of “charitable organisation”. There are three parts to this definition.

Firstly, the organisation must promote a “charitable purpose”. This means any of the following:

- the prevention or relief of poverty or economic hardship;
- the advancement of education;
- the advancement of religion;
- any other purpose that is of benefit to the community.

The phrase “of benefit to the community” is defined in the Act. It includes organisations formed for “the advancement of the arts, culture, heritage or sciences”. This means that all arts bodies will qualify under this part of the definition.

It is the second part of the definition that will separate the charitable arts organisation from the non-charitable. In addition to having a “charitable purpose”, the organisation must be “of public benefit”. The meaning of this is really not explained in the Act. It is not easy to see how it is to be interpreted. Is a theatre of public benefit because it adds to the cultural life of the place where it is located (and receives public funding because of this), or is it simply an organisation which puts on plays for those who pay for tickets, its activities not being necessary for the public benefit? If the answer to the first part of the question is “yes”, then it seems likely that almost all arts organisations will be within the purview of the Act.

## The Arts Organisation as a Charity

The final part of the definition can be mentioned briefly, in that it only requires that the organisation be either a charitable trust or be formed on a non-profit basis.

The meaning of the phrase “of public benefit” is something that will presumably become clear in time. In the meantime, any arts body which holds a CHY number is deemed to be registered, must comply with the requirements of the Regulator of Charities, and will find basic details about itself on the Register of Charities. An organisation without a CHY number will have to make a decision as to whether or not to apply for registration. It is important that this is not overlooked, or the decision postponed. Assistance should be sought from the CRA if the organisation is in doubt about its position.

### The impact of the Act on a qualifying organisation

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The Act imposes a new range of duties on qualifying organisations. Briefly, these are as follows:

#### The obligation to register and provide information

As highlighted above, organisations already in possession of a CHY number from the Revenue Commissioners are automatically registered. All other qualifying organisations must register – in the case of a new charity, before it commences operating; in the case of an existing organisation, within six months of the commencement of the Act.<sup>12</sup> An application fee is payable.

The information to be provided to the CRA includes practical details such as name and address; legal form, purpose and objects; CHY and CRO numbers (if applicable); information about its governing board, the activities of the organisation and its financial affairs in the preceding 12 months.

#### Responsibilities of “charity trustees”

Anybody who serves on the Board or as an officer on the management committee of a charitable organisation is described as a charity trustee. The responsibilities of trustees include the obligation to ensure that the charity meets all of the reporting and other compliance requirements specified in the legislation.

#### Annual reports and accounts

The Act lays down certain standards for financial record-keeping and provides for accounts to be furnished to the CRA on an annual basis.

Until the commencement of the Companies Act 2014, guarantee companies were obliged under company law to file audited financial statements with the Companies Registration Office, annexed to their Annual Return. Because of this, and to avoid imposing a double-reporting obligation on companies, the Charities Act obliges the Registrar of Companies to supply the CRA with a copy of the Annual Return of companies registered with the CRA, with the annexed

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<sup>12</sup> The deadline of 16 April 2015 has been extended by 12 months by the Minister for Justice, who has responsibility for charity regulation.

### The Arts Organisation as a Charity

audited accounts. Because the CRA is to receive the accounts in this way, the guarantee company is not required to file accounts directly with the CRA.

For charitable organisations that are not guarantee companies, there is a duty in the Act to keep proper books of account to a prescribed standard, and to have them audited or certified on an annual basis by a qualified person. For smaller charities, there is a lesser requirement for auditing/certification.

Every charitable organisation, irrespective of its legal nature, will be obliged to furnish annually to the CRA an "Annual Report". This will contain details of its activities in the previous year, and such other information as the Minister may prescribe by regulation.

### Offences, penalties and sanctions

A formidable number and range of offences is created for failure to comply with the legislation. The organisation will be liable for non-compliance, as will the charity trustees personally. Penalties include fines and terms of imprisonment. Charity trustees may also be disqualified from acting in that capacity in the future.

### Sections not yet commenced

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At the time of writing (June 2015) two parts of the Act have not yet been commenced. It is expected that these will come into effect when the CRA is more established. These sections include:

#### Powers of investigation

Among the powers granted to the CRA is a power of investigation of the affairs of charitable organisations. The CRA may appoint an inspector, with whom charity trustees and their agents (including bankers, solicitors and former trustees) must co-operate, furnishing books, records and other information requested. In addition, upon application by the CRA, the District Court may order that the premises of a charitable organisation be searched, and books and records seized.

Two additional provisions yet to be commenced will be of particular interest to arts organisations. These are:

#### **(i) Charity trustees may be paid for services to the organisation**

While the Revenue Commissioners generally refuse to grant charitable status to an organisation which does not by its governing instrument forbid payments to a director or other member of the governing body, the Act softens this for charitable organisations registered with the CRA. It enables charity trustees to be paid for professional or other services rendered to the organisation, so long as this is not prohibited by the constitution of the organisation, the arrangement is documented, and is considered to be reasonable and proportionate by the other trustees.



**(ii) The cost of indemnity insurance may be paid by the organisation**

Another provision yet to be commenced is one which enables charitable organisations to pay the cost of insuring their charity trustees against personal liability for acts or omissions incurred in the performance of their duties.

## Rates exemption

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It is appropriate to deal in this chapter with exemption from commercial rates. This is available for a variety of non-profit arts bodies under the terms of the Valuation Act 2001.

The types of body to which the Act applies include:

- an art gallery, museum, library, park or national monument normally open to the public;
  - the majority of the national cultural institutions;
  - a body which engages in conservation of the built environment;
  - a society occupying property for the advancement of science, literature or the fine arts;
- and*
- a charitable organisation that uses property exclusively for charitable purposes and otherwise than for profit.

The last of these headings normally exempts arts organisations with a CHY number, although of course they may qualify under one of the other headings.

### **The right to dispense with the use of the word “limited”, or “company limited by guarantee” in the name of the company**

The company law rules permitting certain non-profits to dispense with the use of the word “limited” in their names have been restated in the Companies Act 2014. Instead of the entitlement to dispense with the use of the word “limited”, the exemption will apply in the case of the guarantee company to the use of the new suffix “company limited by guarantee”, or its acronym, CLG.

The new rules apply to the guarantee company where:

- its objects are the promotion of commerce, art, science, education, religion, charity or other prescribed purpose;
  - its constitution requires that its profits must be applied to the fulfilment of its objects and may not be paid out to its members; and that in the event of winding up, its residual assets will be paid to another non-profit entity and not to its members;
- and*
- a statement in prescribed form is delivered to the Registrar of Companies, signed by a director or secretary, that the company complies with the above requirements.

### The Arts Organisation as a Charity

On acceptance of the application at the time of first registration of the company, it will be registered without the addition of the new acronym, CLG. The application need not, however, be made at the time of incorporation. It can be made later, as an application for change of name.

For existing guarantee companies, a licence already obtained will continue in force after the commencement of the Companies Act, exempting the company from the need to use the new acronym in its name. For companies who do not already hold a licence, a default position will apply 18 months after the commencement of the Companies Act, obliging such companies to use the acronym. A company which is considering making an application would be wise to do so as early as possible.

### **SUMMARY**

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Following the enactment of the Charities Act 2009 and its commencement in 2014, many arts organisations are for the first time required to register with the Charities Regulatory Authority as “charitable organisations”, as defined in the Act. The regulatory regime introduced by the Act brings a range of new disclosure and reporting requirements. The holding of charitable status with the Revenue Commissioners is not the same as registration with the Charities Registration Authority, and arts organisations are advised to register, or clarify whether registration is appropriate in their case, without delay.

## BUILDING AND SUSTAINING A GREAT BOARD

Besides ensuring that their company is compliant with relevant laws and government regulations, and attending to the company's own constitution, the directors on a great board are alert to their own performance, and to the composition and leadership they provide in the conduct of the business.

Compliance with the law and attention to the constitution and rules – in a limited company, the memorandum and articles of association – have been discussed in chapters 1 and 2. Some other key aspects of board performance are explored here.

### Board composition

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Traditionally, professionals with legal and financial skills formed the cornerstone of many arts boards. These days, great boards try to ensure that they have the maximum possible access to the full range of skills and experience that are needed from directors as the organisation goes through the phases of its lifecycle, from infancy to maturity.

### Board competency framework

A board competency framework is one way of defining the range of skills and aptitudes needed. It should describe:

- 1 The rules governing appointments to the Board, including the maximum number of directors, the power of external bodies to nominate directors (if applicable), provision for term limits and for retirement by rotation. (In a limited company, these rules are to be found in the articles of association.)
- 2 The general principles that will guide the recruitment of a balanced group of directors, including diversity (of age, gender, experience, geographic location etc.), alignment with the values of the body, experience and interest in its work, and so forth.
- 3 The specific aptitudes, skills and experience that are considered desirable in the company's current circumstances. Among others, these may include:
  - artform-specific knowledge or interests;
  - specific business management or professional experience (e.g. Human Resources, financial management and reporting, information and communications technologies, contract law);
  - communications and public relations;
  - marketing and brand management;
  - fundraising.
- 4 The approach the Board will take to board recruitment, development and performance evaluation.

## Building and Sustaining a Great Board

The role and responsibilities of directors should be set out explicitly in a document that forms part of the Board's governance standards – usually consolidated into a volume of materials called the governance manual or handbook. A list of the possible elements of such a handbook is included in the Appendix. On appointment, every director should receive a copy of this handbook, along with a letter of appointment setting out the term of their appointment and any other conditions.

### The optimum size for an arts board

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Whereas by law there must be a minimum of two, the maximum number of directors is sometimes stated in the company's memorandum and articles of association. This is a number that can be changed, and every board should review its own composition periodically – say every five to seven years. There are times in the development of an organisation when it is appropriate to change the size of the Board. After a period of growth, it may be considered necessary to expand the Board in order to take on new skills that are needed, or just to recruit additional people to help share the responsibility of the increased activity. Equally, following self-evaluation, the Board may decide that it has too many members.

Arts organisations funded by the Arts Council tend to have between seven and ten Board members, and we know from recent research<sup>13</sup> that the average number of directors in Irish non-profit companies is seven.

In the past, the boards of some arts organisations were often larger – more than 15 members – sometimes reflecting the legacy of a founding voluntary council whose members were directly involved in aspects of the day-to-day running of the organisation. Likewise, larger boards are sometimes needed when a lot of the business of the Board is done by subcommittees, and directors are needed to populate these.

Before more recent company law reforms, directors sometimes joined arts boards as a gesture of goodwill, without considering themselves bound to attend every meeting. This is no longer regarded as acceptable practice, and may lead to breach of the provisions of the Companies Act that require all directors to share in the responsibility for all decisions of the company. The times and dates of meetings should be set by the directors to suit themselves, and if directors find they are unable to keep to this schedule, they should retire.

Clearly, there is a connection between board competency and size, and the Board should be large enough to accommodate all of the aspects of skill and experience that it requires. As regards the "ideal number", a good rule of thumb is to ask whether all voices can be heard during meetings in an acceptable timeframe. As to small boards, some would say that in a voluntary context, fewer than five is hardly a board at all (although many small private businesses operate with a board of four or fewer members).

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<sup>13</sup> Patricia Quinn *et al.* *Irish Nonprofits: what do we know?* INKEx (Dublin 2012)

## Term limits, director retirement

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It is becoming more common for guarantee companies to set a limit on the number of years, or more usually the number of fixed-year terms, that a director may serve in succession, with three three-year terms normally set as the maximum number. There are good reasons for this, and departing from this norm should be considered only in exceptional circumstances.

Less commonly, the articles may make provision for the automatic retirement of a director who fails to attend any meetings of the Board for a stated period – for example three or six months – unless the directors expressly deem such absences to have been acceptable in the circumstances.

## A competency-led approach to the appointment of directors

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The articles of association will describe the manner in which directors are appointed. Whatever the means of appointment, the Board Competency Framework described above is a good place to start the recruitment process. It allows the qualities being looked for to be discussed in abstract terms (rather than in relation to particular individuals), and it encourages the Board to think 'outside the box', thereby perhaps avoiding perpetuating itself year after year with no regard to the changing needs of the company.

Where the company's members, or an external agency (such as a local authority) has a role in making appointments to the Board, the Board Competency Framework can still be used to express the Board's view about the kinds of vacancies that it considers to exist. This means that the Board is taking a view on what is its own ideal profile at any given time, rather than leaving this important question – even in part – to others.

The corollary of course is that a great board, having decided what its ideal composition is, asks itself to what degree this matches the reality currently, and then sets about a programme of retirements and recruitment as necessary to bring reality in line with the actual requirements of the company currently. How this is brought about is discussed further in Chapter 5 (see Board Evaluation and Development).

## Director recruitment

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There are broadly three ways whereby new directors may join the Board:

- election (by the members of the company, at the AGM);
- nomination by another body (such as a local authority) or
- co-option by the Board.

### Building and Sustaining a Great Board

The articles often provide for a combination of these: that some board positions will be filled by election, and others by nomination. The Board may have the power to co-opt a small number of directors, of its own choosing. Normally, it may also fill a casual vacancy until the next following AGM, when the person selected may offer himself or herself for election.

Whether or not a board adopts the competency framework approach, anybody with the power to elect or nominate directors should be made aware of the Board's priorities and its ways of working. In the case of co-option, and in circumstances in which a person is invited to fill a casual vacancy or to put himself or herself forward for election at an AGM, the reason for the invitation should be explained, and the Board's expectations 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, aptitudes or potential influence are considered valuable to the Board, and without being clear about the amount of time and effort that the Board would like the new director 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, and can also provide the opportunity to refer to 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.

It is sometimes the case that the chief executive or artistic director of an arts company shares in the process of identifying new directors, and/or is given the task of sounding them out as to their availability and interest to serve. While the directors may delegate such functions for administrative convenience, it is important that that chairperson (or another director nominated by him/her for this purpose) and not the manager has a leading role in approaching individuals to join the voluntary board.

### Induction of new directors

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It is of paramount importance that new directors be properly briefed, and the Board should discuss and determine the way in which this matter will be handled. In addition to a verbal briefing from the chairperson (or another board member delegated for the purpose) and the organisation's most senior managers (artistic director and/or CEO or equivalent), new directors should have the opportunity to visit the organisation's premises and gain an understanding of its work in practice, assuming they are new to it.

The verbal briefing will provide an opportunity to describe the structure of the organisation and any issues that are currently affecting its operations – especially financial issues, or legal actions involving it. 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.

The company's constitutional documents should be provided, together with a recent set of management accounts (where available), audited financial statements and any other relevant

written materials, in the form of policy documents, company plans, and so forth. Where the organisation has one, these documents can be appended to the Board Governance Handbook.

## Board evaluation and development

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Besides asking themselves whether they are meeting the minimum compliance standards set out in relevant legislation (including especially the Charities Act 2009 and the Companies Act 2014), most Boards from time to time pause to reflect on their own performance and standards.

One way of doing this is consciously to set out what are the prevailing standards and norms in the organisation, and then document these in the Board Governance Handbook.

Another option is to undertake a Board self-evaluation exercise. This is best done on a confidential basis by each director in response to a questionnaire whose results are aggregated and reported back to the full Board, following which the Board (or an external person, if such has been involved) can agree a programme of action to tackle the issues or concerns highlighted.

There are many excellent templates for board self-evaluation, and most of them cover topics such as:

- 1 Board composition, standards and performance.
- 2 Financial oversight, audit and risk.
- 3 Ethics and compliance (including conflicts of interest or loyalty).
- 4 Stakeholder relationships.
- 5 Board processes and procedures.
- 6 Board dynamics.
- 7 Any other thoughts/ideas that Board members may have to help them and the Board to develop and enhance their ability to perform their functions.

Directors should answer structured questions that relate to the particular work of the organisation and its current strategic priorities and needs, and ample opportunities should be provided for each director to make their own comments on every topic, or on any other topic they would like to raise.

The questionnaire should raise the question of the performance of the chairperson, and the relationship between the Board and the organisation's executive and artistic leadership. These may be sensitive matters, but they can be a source of underperformance in any organisation.

Having decided how it wishes to undertake this process, the Board should set aside time to discuss its findings and to act on them. A board that is interested in continuous improvement will conduct a self-evaluation exercise periodically, say once every three to five years.

## Director training and Board development

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The findings of a Board self-evaluation exercise will usually set out a series of actions that the Board needs to take to improve its own capabilities and performance. These might include:

- changes in the composition of the Board (retirements as well as recruitment);
- the creation or enhancement of Board committees;
- the articulation of explicit governance policies or standards, or
- the requirement for the Board to receive some specific professional advice or support.

The fiduciary obligations of directors require that they take care to inform themselves on every matter on which they are expected to form a judgement or make a decision: it is no defence in law for a director to claim ignorance of financial or regulatory matters, for example.

For this reason, the Board of any organisation of scale should consider:

- offering basic director induction materials and training, if required, to ensure that every director understands his/her responsibilities under company law;<sup>14</sup>
- identifying specialised board development opportunities from the public programmes offered to the non-profit sector in general;
- inviting an expert in governance to provide a bespoke session or sessions on Board development. (This has the advantage of being customised to the specific needs of the organisation.)
- Making available to any director who considers they require it access to expert advice<sup>15</sup> on any topic critical to the life or work of the organisation.

## SUMMARY

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Every arts board is responsible for ensuring it is operating to the optimum of its potential to lead the organisation it governs. While many external factors may be beyond the Board's control, it has a duty to look to its own composition, conduct and continuous development. Documenting its own standards and optimum composition represents good practice, even where there are external bodies with the power to make appointments to the Board.

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<sup>14</sup> The Office of the Director of Corporate Enforcement publishes excellent briefing materials, and there are many public programmes on the topic offered by, for example, third-level institutions, the Institute of Directors in Ireland, the Institute of Public Administration, the Law Society etc.

<sup>15</sup> It is usual to require a director to channel a request for such advice through the chairperson or secretary, for it to be subject to financial cost controls.



## BOARD: EXECUTIVE RELATIONSHIPS

Most arts organisations receiving public funding are constituted as companies limited by guarantee (CLGs), and almost all have boards entirely composed of non-executive directors. The quality of the relationship between the non-executive board and the executive team (artistic director, CEO, general manager) will have a bearing on the performance of the organisation.

The one single factor that most often sours the relationship between board and CEO is a badly framed or poorly defined boundary defining 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 general 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, and it is for the chairperson to ensure that this line is respected. The constitution of the company – as we have already seen – 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 or to the artistic leadership, but it cannot abdicate responsibility for the governance of the organisation. Day-to-day management is the domain of professional staff, led by the CEO and/or artistic director.

In many arts organisations, executive leadership is shared: sometimes it is the artistic leader who is dominant and sometimes the general manager – whatever his/her title. The Board has a responsibility to ensure that reporting lines and responsibilities are well delineated, especially where leadership functions are shared. This is done by a combination of two things: defining the reserved powers of the Board – those decisions that only the Board can take – on the one hand and clearly specifying the role(s) of the CEO/artistic or managing director on the other.

### Recruiting a CEO

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It is sometimes said that planning for and successfully managing CEO succession is the ultimate measure of Board performance. Certainly, in an arts organisation, effectively defining and filling the leadership role(s) probably has a greater impact than any other single factor on the success of the organisation.

The process of selection should be planned with care. The first task is to review the scope of the role, especially if it is some time since it was last filled. Do not automatically assume that the role is unchanged. Are there aspects of the role that need to be developed, or, alternatively, could they be assigned to another member of staff? Is it a full-time or part-time role? What should be the term of the appointment? A detailed job specification and person profile should be approved by the Board, after thorough consideration of these and related questions.

### Board: Executive Relationships

The Board should decide whether it will handle the advertisement and selection processes itself, or will seek expert assistance. If the role might attract applications from within the organisation, the process should respect the confidentiality of these applications.

A Board committee may be appointed to carry out the task, sometimes but not always chaired by the chairperson of the Board. If such a committee is established, the extent of delegated authority being granted, and the way the committee will report to the Board, should be decided. For example, is the subcommittee expected to take responsibility for the process and revert to the Board with a recommended candidate, or does the entire Board wish to interview the shortlisted candidates? In either event, the process should be conducted with respect for all candidates, including the confidentiality of their applications.

Whatever the process, it should be discussed, agreed and minuted at a meeting of the Board.

Where an external recruitment agent is retained, it will propose and then manage the process (including Board participation).

Where a subcommittee has been delegated to undertake the process, the steps will typically include:

- 1 Role and person specification.
- 2 Public advertisement and encouraging candidates to apply.
- 3 Review of applications and shortlisting of candidates for interview.
- 4 Agreement of interview panel to criteria for selection (a "marking" scheme).
- 5 Interview of shortlisted candidates, sometimes in two rounds.
- 6 Recommending a preferred candidate to the Board for agreement subject to references and agreement to contract terms.
- 7 Consulting referees, and agreeing terms with the successful applicant.
- 8 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 or parental 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

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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.

### Board: Executive Relationships

It is wise to take the advice of the organisation's solicitor before conducting interviews. 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 issues before discussing the position with candidates.

### Setting expectations, managing performance

While the organisation's solicitor may guide the directors on the contents of a suitable employment contract, it is for the Board to decide on the ambit of authority of the CEO/the artistic director. 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, at a minimum by defining the responsibilities of the CEO/artistic director in his/her contract, and by ensuring that the Board has agreed a statement of those powers which it has reserved to itself. These typically include setting strategy, approval of contracts over a stated financial level, approval of the creation of new posts etc., in addition to the powers prescribed by law (for example, appointment of the auditor or adoption of the audited financial statements).

### The executive's role in formulating strategy

The policies of any organisation must ultimately be directed towards fulfilling its stated aims, and any fundamental change in direction may need to be addressed as a potential alteration to the constitution. In a company limited by guarantee, this will require alteration of the objects clause in the memorandum of association.

Deciding on strategic focus and direction is a central function of the Board, even if strategic implementation in practice is delegated to the executive. In arts organisations with professional leadership, the CEO/artistic director will have a central role in supporting the development of strategy, but this must have the authority of the Board if it is to be implemented with confidence. Where the Arts Council is a significant source of grant-aid, it will expect that the application for annual or project funding has been approved by the Board.

Agreeing strategy, including an appraisal of risk, can be and indeed should be a matter of lively discussion, with varying opinions, which should be given free expression at Board meetings. The consequences of different strategic choices, and the assumptions underpinning them, should be clearly understood and the CEO/artistic director should be asked to indicate how the strategy will be implemented.

## Supporting the CEO and reviewing his/her performance

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Once a strategy and operational plan have been agreed, the CEO should then be allowed to give effect to them without interference from Board members, assuming that the Board has effective arrangements for interim meetings to provide guidance and support, and to hear reports on implementation.

Between meetings, the CEO and the chairperson will often be engaged in dealing with the consequences of 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, or that of the Board.

It follows that the Board will only be in a position to review the performance of the CEO if it has agreed expectations in advance, and has provided oversight and support as required in the implementation of plans.

## Reporting to the Board

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The way in which the CEO reports to the Board is another matter that should be discussed and mutually agreed, so that practices can be understood by both parties. For example, if the Board wishes to see a written report in advance of the meeting, it is entirely reasonable to ask for it.

It is good practice for the Board to set out in writing the matters on which it reserves the power to make decisions. In addition, it may be wise 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;
- significant proposed contracts, or terms and conditions of significant agreements (which can be defined by reference to value);
- 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, including Arts Council Conditions of Financial Assistance, and correspondence of a non-routine kind from funders;
- anything that would involve a significant change in an established policy, plan or practice of the organisation.

### Board: Executive Relationships

More generally, the annual plan should provide the framework for reports to the Board, with time provided in the agenda for interim review. The agenda should state whether matters are being brought to the Board for information or for decision.

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. Clear, regular financial reports are essential. 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 has approved the way in which the figures are compiled and reported, and that the Board is satisfied with the processes for internal financial control.

At a 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/Financial 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.

### CEO as company secretary

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It is not unusual for the CEO to act as company secretary in cases where the organisation is incorporated as a company. This is a practical arrangement, and the CEO is in many ways the obvious person for the job. However, it may at some point give rise to a conflict of interest, and it has the effect of depriving the Board of an officer who is accountable to them solely on matters of governance and regulation – a role that can only grow in importance and complexity in a time of legislative and regulatory change for companies and charities.

The company secretary is, like the directors, an officer of the company. This places the CEO/company secretary in the awkward position of being at the same time the servant of the company and one of its officers. It can be argued that it is unfair to expect the CEO to carry out these two roles in combination, and that in balance it is preferable to have this role fulfilled by a member of the Board, by another member of staff, or by an external person or agency. Where the role is performed by a staff member who may in their day-to-day responsibilities (for example as financial manager) report to the CEO, this person should as company secretary report to the chairperson of the Board.

## SUMMARY

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Most arts organisations receiving public funding have professional staff and management, and the Board relies on these to give effect to its strategies and plans. It is essential that the Board puts in place appropriate mechanisms to recruit the senior leaders, provide them with appropriate guidance and support, and monitor their performance. In practice, the relationship between the Board and CEO/artistic director relies on clarity about roles and expectations. In larger or more complex organisations this clarity is supported by the separation of the roles of CEO and company secretary.

## LEGAL DUTIES OF COMPANY DIRECTORS

Board members are usually conscious that a range of legal duties apply to them as company directors, and they are anxious to avoid non-compliance. At the same time, they may not know exactly what those duties are. In the past, the law on the subject was a combination of common law duties, which evolved through court decisions, and statutory duties contained in a multiplicity of different legal instruments. The position has been altered by the Companies Act 2014 ("the Companies Act"), which has codified all directors' duties, making the law more accessible.

However, although the Companies Act has improved the position, a complication has been added by the Charities Act. A new range of duties has been imposed on "charity trustees", or persons who are members of the governing Board of a charitable organisation within the meaning of the Act. These are set out in Chapter 3. So, in addition to their responsibilities as directors, those Board members who are also charity trustees will need to be mindful of these new obligations.

Note that the chapter is intended to give an overview of the legal duties of company directors, with particular reference to the needs of arts organisation. It is not intended to be a substitute for legal advice in any given set of circumstances.

It may be helpful to note that a valuable source of information concerning corporate compliance is the Office of the Director of Corporate Enforcement (ODCE). The principal role of the ODCE is to enforce the Companies Acts. The ODCE publishes a number of helpful booklets on the various aspects of compliance, explaining the obligations of individual officers and members of the company as well as those of the company itself.

### What is a director?

Before exploring the duties of the director, some issues concerning the meaning of the term should be clarified.

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 shadow directors and *de facto* directors, and do their responsibilities differ from those of other directors?

As a general principle, when the position of director is offered, accepted, and acted upon, 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.

The terms shadow director and *de facto* director are defined in the Companies Act. The Act makes it plain that those directors are responsible, in exactly the same way as other directors, for their own transgressions and those of the company.

A shadow director is defined as *a person in accordance with whose directions or instructions the directors of a company are accustomed to act*. This is a person or body whose instructions are normally followed by the Board. Professional advisors, when acting in that capacity, are excluded. So also are corporations of which the company is a subsidiary company.

### Legal Duties of Company Directors

A *de facto* director is defined as a person *who occupies the position of director of a company but who has not formally been appointed as such director*. This may be the person whose appointment was somewhat informal and has never been notified to the Companies Registration Office. Going further however, it may be someone to whom the position of director has never been offered, but who – for whatever reason – attends Board meetings and participates in the decision-making as though he or she were a director.

#### The appointment of a director

The constitution of the company will prescribe the ways in which directors can be appointed. This will normally be either by election at the AGM of the company, or by nomination by a body entitled by the constitution to make the nomination. The constitution may also provide for co-option of one or more directors by the Board. Another possibility is that a casual vacancy among elected directors may be filled by the Board, normally only until the next AGM, when the position will be offered by election.

The Companies Act adds some provisions worth noting.

- Any appointment without the consent of a proposed director will be void.
- If two or more positions are offered at a general meeting, they must be voted upon individually, unless it is unanimously agreed otherwise.

#### Duties of a director

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The duties of the director, as stated in the Companies Act, are summarised below.

- Each director is responsible to ensure that the Companies Act is complied with by the company.

This is a general statement which, among other things, makes each individual director responsible for any default by the company in carrying out what are often referred to as its “statutory duties”. These are explained below.

In addition, the director owes the following duties *to the company*. These are described in the Companies Act as the “fiduciary” duties of the director. The term “fiduciary” is not defined in the Act, but is commonly understood to refer to a relationship of trust between parties. The obligations are as follows:

- A director shall act, in good faith, in what the director considers to be the best interests of the company.

This is a subjective determination and recognises that two directors can legitimately arrive at different conclusions as to what is in the company’s best interests. The Act also states that, *provided* the director acts in the best interests of the company, he or she may *have regard to* the interests of a particular member of the company by whom he or she has been nominated or appointed under the company constitution. This underscores the established principle that it is the interests of the company that are paramount, and a director may not *prefer* those of any other person or entity. At the

## Legal Duties of Company Directors

same time, however, it makes clear that the director need not be blind to the interests of an appointing body which is a member of the company. The director is at liberty to raise those interests openly for discussion at the Board table. The discussion should help to identify the decision which represents the best interests of the company. The director should not be reluctant to discuss the member's interests with the Board, nor to make it plain to the member that the best interests of the company must govern the way in which the director will act.

- A director shall act honestly and responsibly in relation to the conduct of the affairs of the company.

This provision is expressed in plain language and needs no explanation.

- A director shall act in accordance with the company's constitution and exercise his or her powers only for purposes allowed by law.

This has always been the case. The activities of the directors must be consistent with the provisions of its constitution, and must be lawful.

- A director shall not use the company's property, information or opportunities for his or her own or anyone else's benefit, unless either this is permitted in the constitution or the use has been approved by a general meeting of the members of the company.

This rule reflects the fact that directors are similar to trustees in control of someone else's property (in this case that of the company). Directors may not use or personally benefit from that property, or seek personal gain from their position. Neither, for example, may they divert business opportunities away from the company to themselves or to companies controlled by them.

- A director may not fetter his or her independent judgement.

This means that a director may not enter into an agreement as to how he or she will act in future, thereby preventing the director from making an informed assessment as to what might be in the best interest of the company at that time. It is not an absolute restriction. It may be permitted by the company constitution or approved by a members' resolution at a general meeting.

- A director must avoid conflicts of interest.

The type of conflict of interest referred to is a conflict between the director's personal interests and his or her duties to the company, as described in this chapter. This duty would prevent a director, for example, from participating in a decision on the part of the company to enter into a contract from which the director would directly or indirectly benefit. This is another duty which is not absolute, in the sense that the director may be released from the requirement, either by the company constitution or by a decision of the members at a general meeting.

It should be noted that there is a specific obligation on a director who is either directly or indirectly interested in a contract or proposed contract with the company to declare his or her interest at a meeting of the directors. There are some qualifications to this rule: firstly, it does not apply to minor decisions which would not come to the Board



### Legal Duties of Company Directors

table, and, secondly, it does not apply to an interest that would not reasonably be expected to give rise to a conflict of interest.

The question often arises for voluntary Boards whether a director may provide services to the company in return for a fee. The Board may wish to engage a solicitor or accountant or other professional member of the Board to provide services which would exceed the contribution that might reasonably be expected from the person in his or her capacity as director.

For all companies, the Companies Act states that, provided there is no prohibition in the company constitution, a director may act in a professional capacity for the company and be paid for his or her services. This does not, however, apply to a director, or his or her firm, acting as the auditor.

However, engaging the director for this purpose may be precluded by the constitution. As the Revenue Commissioners insist on a prohibition on payments to directors as a condition of granting charitable status, any company which has such status will have a prohibition to this effect in its memorandum of association. The position of the Revenue Commissioners may change on this, as the Charities Act provides (in a section that is not yet in force) that charity trustees may be paid for professional or other services rendered to the organisation, so long as this is not precluded by the constitution of the organisation, the arrangement is documented, and is considered to be reasonable and proportionate by the other trustees.

In short, if in doubt on this issue, look first to the memorandum of association. If the company does not have charitable status and the memorandum does not preclude payments to directors, a director may be engaged to provide services. However, the legal position aside, consider whether it might not be preferable for the company to engage external services. This can place the Board in the best possible position, with indisputably independent advice, and the benefit of someone on the Board who can help to evaluate that advice.

The question of payment of expenses (for example, for travelling to and from meetings, and other legitimate costs incurred by a director in attending to the business of the company) is a different matter. The company constitution may make it clear that such payments are permissible, whether or not the company has charitable status. If the constitution does not so provide, the Companies Act now steps in to permit such payments, unless specifically prohibited by the constitution.

- A director must exercise care, skill and diligence.

The director must exercise the same degree of skill, care and diligence that a reasonable person with the same knowledge and experience of the director would exercise. A director who is an accountant, for example, would be expected to behave as a reasonable person with the knowledge and skills of an accountant.

- A director must have regard to certain interests.

As explained above, a director must act in the best interests of the company. However, in considering a decision, the director must also have regard to the interests of the

### Legal Duties of Company Directors

members of the company and the company's employees. In a situation in which, in the opinion of the director, there is an element of conflict between the interests of the members or employees on the one hand and the company on the other, it is the interests of the company that must prevail.

#### Consequences of breach of duty

The eight duties specified above are owed, as mentioned, by the director to the company. If the director is in breach of any of these duties, he or she is liable to account to the company for any gain made as a result of the breach, and/or to indemnify the company for any loss or damage resulting from the breach.

#### Statutory duties

Every director and the company secretary, as officers of the company, are responsible to ensure that the company complies with its "statutory duties". These are rules concerning the administration and operation of companies, long since a part of company law, but stated afresh in the Companies Act. They are quite apart from, and in addition to, the fiduciary duties to the company outlined above. They are very specific and must be strictly observed.

Company officers must play an active role in ensuring compliance by the company with its statutory duties. Any officer who "permits" a default is guilty of the associated offence. The term "permits" means that the person was aware of the basic facts concerning the default, and did not take all reasonable steps to prevent it. Any failure by the company can therefore be laid at the door of any director or company secretary who cannot demonstrate that he or she actively attempted to prevent it.

The most relevant of the "statutory duties" from the perspective of the arts organisation can be dealt with under the following 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**

Legal Duties of Company Directors

- **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 and any other place in which its business is carried on. All company letters, notices, invoices, stationery, publications, cheques and other financial instruments of the company must state its name in full. This includes the word "Limited" or the abbreviation "Ltd" (and since the commencement of the Companies Act, the words "company limited by guarantee" or its abbreviation "CLG", unless permission has been given to dispense with the use of these words). The stationery must also show the names of the directors of the company and their nationality, if not Irish; the place of registration (e.g., 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.

If the company has a website, it must display in a prominent and accessible place on the site the name and legal form of the company (e.g. a company limited by guarantee without a share capital); the place of registration; the company number and the address of the registered office.

- **Accounting records and financial statements**

Every company must keep "adequate accounting records". What is meant by "adequate" in this context is described in a detailed fashion in the Companies Act. While the directors will rely on their accountants to help them with compliance, it is strongly recommended that directors read, at least once, Sections 282-286 and Sections 289-291 of the Act. The former describe in accessible language the basic requirements for accounting records. They specify where accounting records should be kept; who may have access to them, and how long they must be retained. The latter sections oblige the directors to prepare financial statements as at the company financial year end; they describe what should be contained in annual financial statements, and the accounting standards and principles that must be adhered to in drawing up the statements. The directors are under a strict duty to be satisfied that the financial statements give a true and fair view of the financial position of the company.

In tandem with the production of the financial statements, the directors must prepare a "directors' report". This must contain information such as the principal activities of the company during the year and the measures taken by the directors to ensure compliance with the regulations concerning the keeping of accounting records.

The directors' report must include a "business review". The Companies Act sets out a number of requirements as to its contents. It must contain a fair review of the business of the company and a description of the principal risks and uncertainties facing it in the year ahead. This should include a balanced and comprehensive analysis of the development and performance of the business of the company during the financial year, and the assets and liabilities and the financial position of the company at the year end.

## Legal Duties of Company Directors

- **The audit**

Companies limited by guarantee have historically been required to have their books of account audited and to furnish the audited accounts to the Registrar of Companies on an annual basis with the Annual Return. In an important change, the Companies Act has extended to guarantee companies the audit exemption previously available only to small private companies. The Act also provides, however, that if any member serves on the company a notice to the effect that the member does not wish the company to avail of the exemption in that financial year, the exemption will not be available to the company in that year. It is expected that most guarantee companies will continue to have their accounts audited.<sup>16</sup> If the company avails of the exemption, certain assurances regarding the financial statements must be given by the directors and incorporated in the financial statements.

Assuming the financial statements are audited, 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.

- **General meetings**

General meetings are meeting of the members of the company, and distinguishable therefore from directors' (or Board) meetings.

- (i) **The Annual General Meeting (AGM)**

The company must hold an Annual General Meeting (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.<sup>17</sup>

While the AGM is a meeting of members, 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 financial statements of the company for the previous year to the members, and deliver the directors' report and business review referred to above.

The meeting is normally chaired by the chairperson of the Board. The business of the meeting will include consideration of the financial statements, the directors' report, the election of officers, and, unless the company has availed of the audit exemption now available to guarantee companies, the report of the auditors for the previous year and the appointment of the auditor for the forthcoming year.

- (ii) **The Extraordinary General Meeting (EGM)**

The Extraordinary General Meeting (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 scheduled AGM. The directors may convene an EGM whenever they think fit. They are obliged to convene one if requested to do so by members representing at least one tenth of the total voting rights.

<sup>16</sup> The Arts Council will require all organisations funded by it to be audited. It is expected, too, that the Revenue Commissioners will require any organisation benefiting from charitable status to be audited on an annual basis.

<sup>17</sup> The Companies Act 2014 exempts single-member CLGs from the obligation to hold an AGM, under certain circumstances.

### Legal Duties of Company Directors

#### (iii) Giving notice of a general meeting

The Companies Act specifies that the persons entitled to attend a general meeting (whether an AGM or an EGM) and who must therefore be issued with notice of the meeting are:

- every member;
- the directors and company secretary;
- the personal representative of a deceased member;
- the statutory auditor (unless the company has availed of the audit exemption).

Unless the constitution states otherwise, the notice period is 21 days for an AGM. The period is the same for an EGM at which it is proposed to pass a special resolution (see below). For any other EGM, the period is seven days. Shorter notice can be given, but only if agreed by all of the members and the auditor (if any). In calculating the correct period of notice, the day of service and the day of the meeting must be discounted.

The notice convening a general meeting must specify: the place, time and date of the meeting; the general nature of the business to be transacted at the meeting; in the case of a special resolution, the text or substance of the resolution. If proxies are permitted under the constitution, it should also state that a member may appoint a proxy (who need not be a member) and the date and time by which the proxy form must be received by the company to be effective.

- **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 (if any).

The information to be contained in these records is set out below. The records may be kept either by making entries in bound books or by recording the relevant information in any other legible manner, including in computer records. However, in the case of the latter it is necessary to keep hard copies or to take other steps to guard against loss or falsification of the records and to protect the confidentiality of information, where appropriate.

The records should be kept at the registered office or principal place of business of the company, and should be available for inspection by members of the company during business hours. Members of the public are entitled to inspect just two of the registers: the register of directors and secretaries and the members' register.

- \* **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. These details should be entered within 28 days of the person becoming a member.

## Legal Duties of Company Directors

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.

### \* Register of directors and secretaries

This register should record the name, residential address, nationality, business occupation and date of birth of each director, and details of any other directorships held. The date of appointment and date of retirement or resignation should also be recorded.

In relation to the secretary, the register should record his or her name and residential address, and, where the secretary is a company, its name and registered office.

### \* Minute books

Minutes of general meetings and resolutions passed at those meetings must be kept and entered in minute books. Minutes must also be kept of directors' meetings, recording the appointment of officers; the names of those present at each meeting and "all resolutions and proceedings" at the meetings. As indicated above, there is nothing magic about the "minute book" itself. It can be a hard-backed book, a loose-leaf folder, or a computer record.

A question that often arises is the extent to which minutes of meetings should record the discussion which takes place prior to the taking of a decision. Many organisations 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 the minutes. Others may feel it may make directors overcautious 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(s) containing the minutes of general (members') 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

Non-profits will not generally have service contracts with directors. In the event that they do, the company is obliged to keep, and make available to members of the company, a record of any such contract. 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.

## Legal Duties of Company Directors

- **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.

The principal documents which must be filed by companies are the following:

- (i) **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 company secretary. Assuming that the company has its accounts audited (see below), 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 time of year when it prefers to hold the AGM, the ARD and the financial year end of the company. It must 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. For this calculation it must take 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, but this may only be done once in any five-year period.

For a company with a year end of 31 December, the optimum ARD is 30 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 September, once the accounts have been finalised. The company will have until 28 October to file the Annual Return.

Some companies file their own returns, but most instruct 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.

## Legal Duties of Company Directors

Late filing penalties are heavy. A penalty of €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 its 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.

### (ii) Special resolutions

Certain acts of the company can only be performed on the authority of a special resolution of the members, in a general meeting. These include changes to the company constitution and 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.

### (iii) 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.

- **Penalties for failing to discharge statutory duties**

Any failure by the directors to ensure that the statutory duties are complied with is, in general, a criminal offence. Offences are classified into four categories, according to importance. The most serious, Category 1 offences, are punishable by a fine of up to €500,000 and a maximum term of imprisonment of 10 years. The least serious, Category 4 offences, are punishable by a fine of up to €5,000 and a maximum term of imprisonment of six months.

A number of offences involving dishonesty are provided for in the Companies Act. These include 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 serious offences and punishable accordingly. Failure to keep adequate accounting records is subject to the same potential sanctions.



### Restriction and disqualification of directors

Anyone convicted of a serious offence in relation to a company is automatically disqualified from acting as a company officer. In addition, the High Court has 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. 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

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The role of company secretary is separate from that of the chief executive, and as we have already noted it is good practice for the roles to be performed by two different persons. It is appropriate, however, in this chapter to refer to the legal duties associated with the role.

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

The company secretary may take minutes of meetings and may be responsible for circulating Board papers, or these responsibilities may be discharged by another person – but they should be under the company secretary's supervision. However, the company secretary is more than 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. Primarily:

- The company 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.
- The company secretary is equally responsible with the directors for compliance with the "statutory duties" of the company.

The ODCE publishes information about the role of company secretary. However, helpful as this is, it does 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.

## SUMMARY

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The legal duties of company directors have evolved over many years and have recently been codified in the Companies Act 2014. For the trustees of charitable organisations, these duties are augmented under the additional requirements of the Charities Act, already discussed in Chapter 3.

This chapter summarises the principal legal duties of company directors, including the requirements to keep proper records, make appropriate disclosures and maintain adequate standards. It also refers to the penalties for non-compliance, which can impact on a person's capacity to serve as a director in other companies. In addition, it touches on the responsibilities of the company secretary – an important function which should be properly resourced.

## SOME PRACTICAL ADVICE FOR BOARD MEMBERS

In most arts organisations, the Board members are drawn from diverse roles and sectors. They enter into an engagement which is usually interesting and rewarding, if occasionally challenging. It always involves learning, as well as sharing of the Board members' own knowledge and experience. Of course legal and regulatory compliance must be managed, but this should not spoil the enjoyment of the exercise. With a modicum of effort and the willingness to work together as a team, even a competent Board can make a valuable contribution to the stability of an organisation. A great Board can do much more.

The following advice is distilled from the guidance in earlier chapters.

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- **Pay attention to the business of the Board**

Only undertake the role of Board member if you are enthusiastic about the prospect, and are willing to devote time and energy to the task. Any Board member who finds it impossible, for whatever reason, to pay attention to the affairs of the organisation, or who cannot develop a genuine sense of care about it, ought not to remain in the position. "Paying attention" in this context means staying informed by reading Board papers provided in advance of meetings, attending Board meetings and playing an active role in the Board's deliberations, placing your knowledge and experience at the disposal of the Board. More generally, it is difficult for a Board member to play a useful role if he or she does not have an active interest in the artistic work of the organisation. It is particularly useful for Board members to attend events run by the organisation, demonstrating support and getting a sense of the actual work being done; it is too easy for the Board to become remote from this.

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- **Be consistently aware of the financial state of the organisation**

Every board member should be satisfied at all times that the company is solvent and able to pay its debts as they fall due. This is not only in the interests of the organisation itself, but for the protection of Board members in their personal capacity. If a company trades in an insolvent condition, then conditions have arisen in which the directors may be exposed to personal liability for its debts.

To what extent need Board members be informed about finance? The provision of financial information to the Board will usually be the job of the CEO. It is necessary, at minimum that:

- an annual budget is prepared and approved by the Board;
- the Board receives regular management accounts from the CEO, in which the performance of the organisation in the previous period is measured against budget;
- management accounts are presented in a form that is understood by Board members;
- the Board ensures that the auditor is briefed promptly after each financial year end, and that it is kept informed by the CEO on the progress of the audit and of any queries posed by the auditor;
- Board members fully understand and agree with the draft audited accounts before signing them.

### Some Practical Advice for Board Members

It cannot be overemphasised that each Board member should understand the financial information provided to the Board. There are many Board members who consider that they do not have strong financial skills, but any urge to leave financial matters to others who appear to be more knowledgeable should be overcome. There is no guarantee that they are not taking a similar view.

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 organisation's accountants to help. Devise a survival plan. Meet with the Arts Council. Consult with the organisation's bankers and, if necessary, with creditors. If the organisation has a credible track record in its dealings and can demonstrate a plan to trade out of its difficulties, banks and creditors are often willing to provide the necessary support.

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- **Provide leadership of the organisation**

Every enterprise has goals, and requires leadership to reach them. Leadership is the principal role of the Board. It must seek to ensure that the vision and values of the organisation as expressed in its constitutional documents are upheld and elaborated in various ways, primarily by the adoption and implementation of strategic plans. The Board points the way, in consultation with the executive. It also leads by ensuring that strategies are sufficiently articulated in operational plans, and by overseeing their implementation.

Sometimes Boards become lethargic or complacent. This can happen, for example, because there is a highly competent CEO who appears to be able to run the organisation alone, or the Board composition has been static for a number of years and needs an infusion of fresh blood and new ideas. It can lead to a spiral, in which the Board loses competence and makes itself increasingly irrelevant. The important thing to recognise is that this can be changed once the problem is identified and acknowledged. Some investment in the Board's own capabilities, for example through a Board development session or self-evaluation process, can kick-start a plan to renew the leadership role of the Board.

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- **Practise collective responsibility**

The collective responsibility of the Board should act as a reassurance to Board members. While they may have individual areas of expertise which are called upon from time to time, the members of a Board act collectively as a body, and reach their decisions as a group. No Board member, and this applies in particular to the chairperson, should feel solely – or even primarily – responsible for any Board decision. The best solutions are those which represent the collective wisdom of the Board as a whole.

A corollary of this is that decisions *should* be reached by the group. The Board is undermined if, for example, Board members privately canvass each other for support for decisions. It is necessary for everyone to trust that the Board as a whole will arrive at the best result, and to act in that belief.

### Some Practical Advice for Board Members

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- **Base decisions on what is best for the organisation**

Sometimes it is difficult to see the reasons why we favour a particular course of action. Board members can fall into the habit of deferring to the CEO. A dominant chairperson may stifle the opportunity for real debate. A good habit to develop is that of asking 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 organisation?
- Is the proposal consistent with the aims of the organisation as set out in its constitution?
- Is it in keeping with its ethos?
- Will it cause a conflict of interest or loyalty for me or any Board member?
- Is it likely to be met with internal resistance, or for some other reason may need to be handled sensitively?
- Are there negative impacts for employees, or, in the case of a company, for the members?
- Does it compromise the organisation in any way?

Questions such as these are helpful in guiding Board members to identify solutions which are in the best interests of the organisation.

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- **Don't overlook succession planning**

Succession planning is something which is often overlooked, and can result in periods of underperformance by the Board. It is linked to the problems associated with Board members staying too long in the position. A Board needs regular changes in personnel, to remain energetic and fresh, and to reflect changing needs and conditions. At the same time, it should avoid the sudden loss of people who perform key functions, such as the chairperson, or company secretary.

This is an issue that should be on the Board table for discussion at least annually. Most articles of association now incorporate Board renewal provisions. It is useful to review these in advance of the AGM, to identify the resignations they will imply, and how vacant positions will be filled. As noted in Chapter 6, the Companies Act 2014 introduced three-year rotation as a default position, but with the right for persons retiring to offer themselves for re-appointment. A Board that can move from a situation in which its members cling to office for protracted periods, to one in which they recognise the value of changes in personnel, is performing a valuable service for the organisation.

The guarantee company provides the opportunity to enable a retiring director to continue to make a contribution to the decision-making process, by remaining as a *member* of the company. As explained in Chapter 2, the members have an important role to play. They can bring the wisdom of earlier involvement as directors to decisions made in general meetings. Some organisations find that this is a helpful “bridge” between retiring as a director and ending all formal association with the organisation.

Some Practical Advice for Board Members

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- **Be honest and forthright in your dealings concerning the organisation**

In general, given basic competence, a Board that is honest and forthright in its dealings is very unlikely to find itself in any serious trouble, provided of course the virtues are practised consistently and not employed as a tool of last resort. Honesty clearly involves the avoidance of dishonest practices or behaviour. Less obvious perhaps is the need to be forthright about possible conflicts of interest. As noted in Chapter 6, a company director must disclose a personal interest in any transaction of the company and may not use his or her directorship for personal gain. A director must also be scrupulous about absencing himself or herself from any discussions about matters in which that director has any personal interest.

Board members must also be aware of the need for the organisation 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 future difficulty in the relationship with the donor.

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.

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- **Practise accountability to a high standard**

The operating environment for all non-profit organisations – and not just those active in the arts – has changed. Company directors have duties of accountability both within the organisation and outside it. Internally, directors of a company are accountable to the company itself, to the members and to staff. Outside the organisation, the Board is accountable to regulators, as well as to funders, donors and other stakeholders who have an interest in the work of the organisation.

A good Board will take compliance in its stride, but will also take accountability to a higher level. It will have an active sense of all those who have an interest in the work of the organisation, developing effective means of communication with them and hearing about their interests and concerns.

### Some Practical Advice for Board Members

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- **Be informed about best practice**

While the governance needs of every organisation are unique, there has been a concerted effort in recent years to codify good governance standards for the benefit of all non-profit organisations.

What has become known simply as “the governance code” provides extensive guidance, tailored to the needs of small, medium and large non-profit entities ([www.governancecode.ie](http://www.governancecode.ie)).<sup>18</sup>

A variety of financial reporting standards are available, and indeed one may soon be enforced by the Charities Regulatory Authority, which enable financial reports to be presented in a way that is more appropriate for non-profit entities.

The Statement of Good Guidance for Fundraising sets out best practice standards for fundraising operations.<sup>19</sup>

While certain of the codes were designed with the charity sector in mind, they are of unqualified benefit to arts bodies. Organisations can choose which of them are most relevant for their purposes, and adopt them appropriately. Increasingly, institutional funders, including the Arts Council, look for compliance with some or all of the standards.<sup>20</sup> They generate trust in the organisation and are invaluable to fundraising operations; they educate Board members and make Board business that much easier.

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<sup>18</sup> Code of Practice for Good Governance of Community, Voluntary and Charitable Organisations in Ireland: see <http://www.governancecode.ie>.

<sup>19</sup> Developed by the Irish Charities Tax Reform Group (ICTR): see <http://www.ictr.ie/content/fundraising-codes-practice>

<sup>20</sup> With effect from January 2015, the Arts Council requires organisations in receipt of annual funding to comply with a transparency code.

## APPENDIX

### Board Governance Handbook: sample list of contents

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These materials can be shared electronically on a private log-in only Board zone on the company's website or in a free service like Google Apps.

1. Role and responsibilities of directors of \_\_\_\_\_
2. Code of ethical and business conduct
3. Board and board committee Standing Orders/ways of working
4. The role of the chairperson
5. The role of the company secretary
6. Board competency framework
7. Financial controls and procedures: company policies
8. Terms of reference for Board subcommittees/working groups as relevant
9. Policy concerning Board self-evaluation
10. Policy for directors to claim expenses
11. Policy concerning directors' and officers' insurance
12. Policy concerning directors' access to external professional advice
13. Board statement of compliance with the Governance Code (where relevant)
14. Board statement of compliance with the provisions of the Statement of Guiding Principles for Fundraising

### Attachments

15. Memorandum and articles of association/Constitution and rules
16. Most recent audited financial statements
17. Register of company members
18. Key agreements, licences, reports or other documents that all directors should be familiar with e.g. outcome of the most recent Board self-evaluation report
19. Contact list for directors and key staff





