

Legal Perspectives for Board Members of Commercial State Bodies

An Overview by Maurice Dockrell,
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Different types of State Body

- Large number of State Bodies of varying structures, commercial and non-commercial
- Different structures have different governance requirements - matter for negotiation with parent Department
- Commercial State Bodies and their subsidiaries must take heed of company law principles

Obligations on Commercial State Bodies (CSB)

- CSB and subsidiaries are obliged under Code of Practice (CoP) in certain circumstances to take all reasonable steps to ensure that such ventures comply with principles of corporate governance applicable to commercial bodies/companies generally.
- Must confirm to relevant Minister this has been done.

“Certain Circumstances”

- Include – when are involved in:
- Strategic alliances
- Joint ventures
- Or other shareholding arrangements with shareholders other than the State.
- Where the CoP is not easily enforceable general company law principles must be followed.

General requirements for Board Members

- Should act:
- On a fully informed basis
- In good faith
- With due diligence and care
- In the best interest of the State body/company
- Subject to the objectives set by the Government (or constitutional documents of the company)

Obligations placed on Directors by the CoP

- Exercise independent judgment
- Put in place procedures to deal with conflict of interest
- Responsibility in preparing annual accounts
- Must ensure Chairperson keeps Minister fully informed

Obligations placed by Cop cont.

- If finds evidence of non compliance with statutory obligation must act immediately to bring it to attention of Board to rectify the breach and
- It should be brought to the attention of the Minister by the Chairperson indicating
 - a. consequences of non compliance and
 - b. steps to rectify breach

Code of Conduct in CoP

- Focus on individual behaviour
- Object is public trust
- Conflicts are defined as real or perceived
- Board must have direct input into Code of Conduct and set out procedures for dealing with conflict of interest
- Companies Acts, if applicable, must be complied with

Disclosure of Interests by Directors under CoP

- Ethics in Public Office Act 1995
- Standards in Public Office Act 2001
- Directors must declare business or professional interests, including shareholding, directorships, professional relationships etc that could materially influence conduct
- Interests of family members that Director reasonably aware of included.

Disclosure of Interests cont.

- Director should absent himself when deliberating or deciding on matters in which or a person or body corporate connected to him has an interest
- Where there is query whether there is a conflict of interest up to Chairperson to decide
- Former directors should treat commercial information received as confidential

Obligations conferred by the Companies Acts

- Who may be a director?
- Any person except:
 - An undischarged bankrupt
 - An auditor of a company
- Persons restricted in their directorships by the courts, e.g. s.150 of the Companies Acts
- Disqualified persons

Duties of Directors

- Overriding duty is to ensure the requirements of the Companies Acts are complied with
- Must act in good faith in best interests of the company
- Director may not enter into an arrangement with the company unless has shareholder authority to do so

Duties of Directors cont.

- Director may be liable to account to the company for any profits he makes as a result of his office (whether or not there has been a breach of duty or abuse of power)
- Director cannot limit his discretion in any way which would inhibit him from exercising his functions in best interests of the company

Directors Duties cont.

- Must exercise skill, due diligence and care
- Need not exercise a greater degree of skill than could be reasonably expected from a person of his knowledge and experience
- Not liable for errors of judgment provided he genuinely believes was taken in best interest of company

Directors duties cont.

- Director is not bound to give continuous attention to affairs of the company
- Director is entitled to rely on officials of the company to run the affairs of the company (in absence of grounds for suspicion). Relationship with CEO of particular importance

Duty to be diligent

- Courts have placed personal liability on directors where are found to be negligent or reckless
- Inattention at Board meeting is no excuse
- Those directors with particular expertise or experience will be treated more strictly
- Must act honestly and responsibly in all circumstances

Proper books of account

- Directors can be made liable for failure to keep proper books of account
- Delegation to keep proper books of account to a particular person will generally absolve director of personal liability
- Directors entitled to see books of account at any time – may bring accountant with him to inspect accounts

Protecting those dealing with the company

- Three main categories
- a. Creditors
- b. Employees
- c. Shareholders

Conflict of Interest under Companies Acts

- Director is bound to avoid conflict of interest
- May not use information received as a director to gain a competitive advantage against the company
- Rule applies even where profit was made in absence of mala fides
- May be released from obligation by shareholders

Conflict of Interest cont.

- Rejected business opportunities – Director may avail of opportunity which company has bona fide rejected
- It is permitted to be in competition with the company but not to use confidential information or to divert business
- Remedy v directors is damages

Sanctions against directors

- Criminal
- There are over 90 offences under the Companies Acts
- Civil
- Restriction or
- Disqualification

Onus of Proof

- s.100(2) of the Company Law Enforcement Act 2001 states an officer of a company “shall be presumed to have permitted a breach by the company unless he can establish he took reasonable steps to prevent it or it was beyond his control
- Ethos of legislation is for Director to prove has behaved properly

Defence to actions against Directors

- Section 391 CA 1963 provides a defence that the director has acted honestly and reasonably in all the circumstances of the case
- Section 200 of CA 1963 prohibits any indemnity in respect of negligence, default, breach of duty or trust

A final thought

- CoP clearly influenced by Company law
- Large degree of overlap – focus on individual responsibility
- Less likelihood of problems in State bodies than in private sector – greater scrutiny
- More likely to be properly run
- Less freedom of action
- Area likely to develop in next few years