

## Roles and Responsibilities of Directors

Company Law (Companies Act 2006 and as amended) establishes a number of requirements for Boards of Directors. A private company must have at least one Director and there is no prescribed upper age limit. There are no formal qualifications for being a Director unless there is specific provision within the Articles of Association for the company.

Directors may be:

**Executive Director** with responsibility for executive management or direction of all or a part of the company's business of affairs – for example, a Managing Director or a Finance Director

**Non-Executive Director** – a Director without executive role in the company. The legal duties of a non-executive Director are the same as those of an Executive Director.

**Company Chairman** – Chairman of the Board of Directors whose primary role should be to provide leadership to the Board

**Shadow Director** – defined (S251 Companies Act) as a person in accordance with whose directions or instructions the Directors are accustomed to act. Such a person may have the same legal responsibilities and liabilities of a formally appointed Director.

A Director holds a position of trust and owes a fiduciary duty to the company and thus to the shareholders or members. A Director must act in good faith and must not make a personal profit. The fiduciary duties of Directors are codified in the Companies Act 2006 which sets out seven statutory duties:

- The duty to act within the company's powers (S171)
- The duty to promote the success of the company (S172)
- The duty to exercise independent judgement (S173)
- The duty to use reasonable care, skill and diligence (S174)
- The duty to avoid conflicts of interest (S175)
- The duty not to accept benefits from third parties (S176) and
- The duty to declare an interest in a proposed transaction or arrangement with the company (S177)

Good governance requires that Directors should:

- Understand the legal and regulatory requirements of the business including the requirements for an effective Safety Management System (SMS), the requirement to maintain public liability insurance and any special requirements of the organisation's authorising legislation.
- Receive appropriate induction on appointment to ensure this with the rigour and formality of the induction reflecting on the size and complexity of the business,
- Establish appropriate policies and procedures, for example in relation to Health and Safety, and keep them under review.
- Ensure that good internal financial and management controls are in place and review their effectiveness regularly.
- Identify and review the major risks that the business faces. The best practice is to create and maintain a risk register – this should be regarded as a working document. Directors should ensure that policies are put in place to manage identified risks
- Where relevant, establish committees, set their terms of reference and review their performance.

- Be clear about any specific responsibilities they may have on the Board
- Review the performance of the Board as a team and as individuals
- Plan ahead for succession and identify changing areas of the business where new skills and expertise may be needed at Board level.

Directors should be aware of current legislation and requirements covering both general company law, provisions relating to heritage railways and any specific requirements of the operation in question given its legal status and authorising legislation.

Directors should make sure that there are appropriate and up to date policies and guidelines in place and that these policies are actually being followed. To optimise the effectiveness of the Board, there should be sufficient mix of skills, competencies and experience represented on the Board. Allocation of specific areas of responsibility should be accompanied by adequate reporting and review procedures.

It is good practice to establish committees to allow effective discharge of the Board's duties. The Board should define in writing the terms of reference of committees, the extent of powers that are delegated either to committees or to individuals and the provisions for reporting and reviewing. There has to be proper supervision of committees and individuals to whom powers are delegated. The supervision of particular areas may best be delegated to Audit or Finance and Audit committees of the Board which reports back, periodically to the Board. On the Swanage Railway the Finance Advisory Group and the Rules Committee may have some responsibility but the overall determination of reference and reporting must be the responsibility of the Board.

Directors need to exercise oversight over the whole of the organisation and take decisions for the overall benefit of the company and not just to reflect the interests of a section of the business. There should be suitable checks and balances in place to make sure that no one individual can have unrestricted power over decision making in a particular part of the business. The most important decisions affecting the company should always be taken on a collective basis.

Directors should recognise the need for them to act independently and to exercise independent judgement. When acting as Directors they should have regard to the interests of the company and to take decisions for the benefit of the company. A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company (S175 Companies Act)

Overall, the Directors should set and safeguard the vision, values and reputation of the company.

The HSE and the Institute of Directors have published guidance as to the health and safety responsibilities of company directors, recommending that each board must:

- accept its collective role in providing health and safety leadership in their organisation;
- nominate a director to champion health and safety issues;
- ensure that each member accepts individual responsibility and makes sure that their actions and decisions at work reinforce the messages in the board's health and safety;
- make sure all decisions reflect the intentions in the organisation's health and safety policy;
- encourage workers at all levels to become actively involved in health and safety; and
- keep up to date with relevant health and safety risk management issues and review its health and safety performance regularly, at least annually.

Failing to act in accordance with the statutory duties may incur significant liability.

## Liabilities

Alongside responsibilities there are potentially significant liabilities including personal liabilities that may fall on Directors. Directors owe a duty to the company and, if insolvency threatens, to creditors.

Directors are subject to a number of statutory requirements and restrictions. These include a duty to keep proper books and records and restrictions on entering into certain transactions with the company or accepting loans from the company. Breach of these duties and requirements can result in a director being disqualified from acting as a director and in many cases can lead to the director incurring personal liability. Insurance can be obtained to cover some cases of personal liability – the railway has Directors and Officers Liability Insurance (D&O) for this eventuality. However, no insurance cover is available where a Director has acted negligently.

A director may be personally liable (amongst other situations):

- to a fine if the company does not comply with any of the requirements in The Companies (Trading Disclosures) Regulations 2008 and fails to make the trading disclosures required under those Regulations (Regulation 10 of The Companies (Trading Disclosures) Regulations 2008);
- if he acts in the management of the company while disqualified or acts on the instructions of someone whom he knows to be disqualified
- for damages if he makes a fraudulent or negligent misrepresentation in the course of negotiating a contract between the company and the third party;
- under the criminal offence of making a false statement as to the affairs of the company with the intent of deceiving shareholders or creditors of a company (section 19 of the Theft Act 1968);
- for imprisonment (up to 10 years) or a fine if he is knowingly party to the company carrying on its business with intent to defraud creditors of the company or of another person or for any fraudulent purpose (section 993 of the Act );

A number of statutes contain provisions stating that if a company commits a criminal offence, a director is also guilty of the offence if it is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, the director. 'Consent' means being aware of what is going on and agreeing to it; and 'connivance' means knowledge together with a negligent failure to prevent. 'Neglect' implies that there is no need for knowledge of the matters amounting to the offence, instead, there merely is a failure to act when under a duty to do so.

## Role of the Chairman

The Companies Act makes no specific reference to the role and duties of a Chairman. However, in terms of good governance the company needs someone who will provide the necessary leadership to the Board to ensure that it operates effectively in directing the activities of the company and achieving its visions and also acts as an ambassador for the company.

There is detailed guidance for Chairman and Non-Executive Directors in the Higgs Report (2003) which identifies the attributes of company Chairmen

- Personal integrity and authority without domination
- Intellectual capacity
- Decisiveness and insistence to get things done
- Ability to ensure that the Board properly addresses all the major strategic issues that will affect the company's prosperity, visibility and reputation
- Having a proper focus on the Board's key tasks and ensuring that they are addressed
- Taking responsibility for the Board's constitution and development including succession matters
- Providing a sense of purpose, a vision and a set of priorities and objectives, with skill in guiding the Board to focus on the relevant issues
- Engaging the Board in assessing and improving its effectiveness
- Overseeing the induction of new appointees and the development of individual directors
- Ability in planning and managing the Board's business
- Employing political skills and an ability to engage all the Board members and manage their relationships
- Acting as an effective mentor, sounding board and advisor to other Directors

Against this background, the Chairman's leadership role will involve:

- Taking responsibility for moulding the composition of the Board and its development getting all the Directors involved in the work of the Board and engaging the Board in assessing and improving its performance.
- Ensuring that the company adopts good practice in its governance and structures and also that proper information is provided to the Board.
- Taking responsibility for the induction of new Board members and the development and training of existing Board members or, alternatively, ensuring that other senior member of the Board takes and discharges this responsibility.
- Supporting those who undertake executive roles whether at Board level or at management level
- Displaying personal integrity and authority without being domineering. The Chairman, as with all Directors, must remain accountable to fellow Directors and, ultimately, to the members of the company.
- Guiding the Board by taking the lead in planning and effective management of the Board's business, in consultation with the Company Secretary.
- Guiding the Board by helping it to focus on the key issues and not to allow it to be side-tracked.

A particular role for the Chairman will be to establish the agenda for each Board meeting, in conjunction with the Company Secretary and management team in order to ensure that decisions required by management are taken in a timely way. The Chairman also needs to ensure that decisions of the Board are properly recorded. The Chairman should ensure that adequate time is available for taking decisions and should ensure that all Directors have both adequate information in advance of the Board meeting and the opportunity to make their contributions during the meeting itself.

## **Role of the Company Secretary**

There is no longer a requirement for a private company to have a Company Secretary – this role is still required for public companies. If a private company decides to have a Company Secretary there is no qualification requirement and no minimum age.

A Company Secretary is not a Director (unless specifically appointed as such) and therefore does not have the same responsibilities and liabilities to the outside world.

Companies have statutory obligations not only to maintain up to date financial accounting records but also the company books including the register of Directors, register of Directors' service addresses, register of Directors' private addresses (which in terms of the Companies Act 2006 must not normally be disclosed) and register of members. The maintenance of such books would fall within the responsibility of the Company Secretary if one is appointed.

There are requirements to make annual returns and to submit other documents to the Registrar of Companies (Companies House) and within prescribed timescales. Where there is no Company Secretary, Directors need to ensure that the company's documentation is in good order and that the necessary returns are being made in a timely manner.

The Company Secretary will work with the Chairman to ensure planning and effective management of the Board's business and to prepare and distribute an agenda for each Board meeting. The Company Secretary will maintain an accurate record of all Board meetings including a record of all decisions taken.

It is likely that a Company Secretary will be able to undertake a role as 'critical friend' to the Chairman and to members of the Board.

## Office of Rail and Road

The Office of Rail and Road (ORR) has published guidance in the Risk Management Maturity Model (RM3) which contains specific guidance on Health and Safety Policy, Leadership and Board Governance.

All Directors should ensure familiarity with the ORR's RM3 model and, in particular, the provisions of Section SPI and the 12 Tablets of Governance.

### Leadership

Leadership from the top provides a consistent example and inspiration for leaders at all levels of the organisation. Good leadership in health and safety (H&S) management involves:

The attitudes and decisions of senior managers aligning with the H&S policy and culture;

Identifying and promoting the styles of leadership and management practices at all levels, which best support a positive H&S culture;

Promoting effective collaboration and engagement of all staff and business partners to achieve continuous improvement on H&S;

Aligning the leaders in all parts of the organisation around the common H&S purpose, strategies and goals;

Assessing H&S leadership and management behaviour to improve the control of risk and;

Setting standards and expectations to help the organisation achieve its goals and strategies for improving health, safety and performance.

### Board Governance

An effective board provides clear direction, leadership and oversight for health and safety (H&S). It sets the 'tone from the top' and help achieve long term viability. An effective Board is:

- Setting direction by defining H&S policies, vision, strategies, goals, values and culture;
- Defining the arrangements to manage risk and monitor effectiveness;
- Ensuring appropriate resources for controlling H&S risk are provided
- Leading by example to promote a leadership style which supports appropriate H&S culture;
- Delegating to management through organisational structures and SMS.

Smaller heritage railways may not have a complex board structure. It is likely all will have persons fulfilling the functions of key corporate roles required by company/charity law: e.g. chairperson, director, trustee. Organisations should take into account the 12 'Tablets of Governance' detailed in Appendix I when developing their maturity.

**Purpose**

The 12 'Tablets of Governance' describe what proportionate governance and leadership look and feel like.

**Preparedness**

Each Director shows up to meetings totally prepared for their role.

**Doing the right thing**

Directors individually and collectively will always strive to do the right thing in the right way for the right reasons and at the right time.

**Faith**

Directors will retain faith that they will prevail in the end regardless of difficulties and at the same time confront the brutal facts of the current reality, whatever that might be.

**Alignment**

Directors must always have full alignment between the core purposes and values [which the Board should define/refer to here]. The Board makes sure that these values underpin all its decisions and railway's activities.

What it is they must excel at – [to be stated]; what is it they cannot fail at – [to be stated]; what makes Directors think they are delivering – [to be stated]; and how do they keep delivering – [to be stated].

**Bottom line of Governance**

Our base line is [Board to state here], the UK Corporate Governance Code , and if a charity the Charity Commission Charity Governance Code ; or and other relevant codes. Further information is also available at the HRA Guidance note on the duties of Board Directors & Chairs .

Directors will comply with all legal, regulatory and recognised good practice requirements. All Directors will have read and understood all relevant documents and update themselves with individual continuous professional development and board wide training.

The four basic tasks of the Board are:

- Establishing and maintaining vision, mission, and values
- Deciding strategy and structure
- Delegating the authority to manage to monitor and evaluate performance
- Communicating with its members and all internal and external stakeholders

**Roles and responsibilities**

Each Director will have specific roles, responsibilities and standards of ethics and behaviours; and these will be written down and available to all. Directors can never tolerate carelessness, incapacity, and neglect; they are forever accountable for what they do and what they fail to do. Both individually and collectively. Directors will never compromise their responsibilities. They will never take anything for granted. Directors will never be found short in their knowledge and in their skills.

They will also recognise other roles need to be fulfilled to make an effective Board: someone who looks to the stars; a stickler for procedure and detail; someone grounded in practicality; the devil's advocate; the sensitive, touchy feely one; someone to give alternative views and a different perspective; the ice cold logical view; and someone to always provide the moral compass.

### **Planning for the best and worst**

The rules / constitution / governance documents / policies and strategies will be regularly reviewed (e.g. annually). Their purpose should include setting targets and objectives for success and intervention, and describe and reference arrangements designed to guide the organisation through any foreseeable conflict, crisis, and disaster. Directors must never forget every organisation is vulnerable, no matter how big or small, strong or weak, and whatever stage of development. Directors must always prepare and plan for their succession.

### **Leadership and teamwork**

Directors will strive to act as a team, respecting and utilising the abilities of others whilst realising they are working towards a common goal. Success depends on the efforts of all. Directors must be disciplined to follow, as well as to lead, knowing that they must master themselves before they can master their task.

### **Making the best decisions**

The Board working as one, not individuals, make the best decisions. Directors must have the courage and integrity to challenge how things are done: not settling for the status quo. The Board should confront and overcome complexity, incomplete information, the consequences of being wrong, and the human element. Decisions must be based on truth and reality – what is actually done versus what should be done in accordance with the standard. Where possible, Directors should seek alternative perspectives, question their objectivity, be paranoid to biases, and be open to new information. No decision can be absolutely right or wrong, but it must be the best they can make.

### **Vigilance**

Directors must be always attentive to the dangers and risks to the business, never accepting success as a substitute for the rigour in everything they do. Directors must share information willingly and openly even when it is challenging and discomfoting for them. Directors will continually keep asking why, looking behind the incident reports for underlying factors. Why something happened? Why something didn't happen? And the How it happened. Acknowledge that small errors that aren't caught and corrected can lead to bigger failures.

### **Communication**

Directors must listen closely and carefully when colleagues, staff, members, volunteers, customers and stakeholders talk. What they say and what they don't say. What do Directors need to do, to find out more? Whenever possible record everything in writing to reduce risk of misinterpretation and confusion. It will be the only record on which future actions and learning can be based. Whenever possible double check what Directors think they have communicated has been understood, always use language that is simple, inclusive, and understandable. Be prepared that Directors themselves are the communication problem.

### **Final Tablet**

Constantly guard against a Board where good people are leaving, power is concentrated and exercised by the chair; and key appointments go to a select few. Be aware of the risk created by telling rather than consulting; key decisions being made by small select groups; and popular projects winning over essential projects.



## **Companies Act 2006 - extract**

The general duties specified in Sections 171 to 177 of the Companies Act 2006 are owed by a Director of a company to the company. The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.

### *The general duties*

#### **171 Duty to act within powers**

A director of a company must—

- (a) act in accordance with the company's constitution, and
- (b) only exercise powers for the purposes for which they are conferred.

#### **172 Duty to promote the success of the company**

- (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
  - (a) the likely consequences of any decision in the long term,
  - (b) the interests of the company's employees,
  - (c) the need to foster the company's business relationships with suppliers, customers and others,
  - (d) the impact of the company's operations on the community and the environment,
  - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
  - (f) the need to act fairly as between members of the company.
- (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
- (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

#### **173 Duty to exercise independent judgment**

- (1) A director of a company must exercise independent judgment.
- (2) This duty is not infringed by his acting—
  - (a) in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors, or
  - (b) in a way authorised by the company's constitution.

#### **174 Duty to exercise reasonable care, skill and diligence**

- (1) A director of a company must exercise reasonable care, skill and diligence.
- (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—
  - (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
  - (b) the general knowledge, skill and experience that the director has.

### **175 Duty to avoid conflicts of interest**

- (1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
- (2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).
- (3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.
- (4) This duty is not infringed—
  - (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
  - (b) if the matter has been authorised by the directors.
- (5) Authorisation may be given by the directors—
  - (a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or
  - (b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.
- (6) The authorisation is effective only if—
  - (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and
  - (b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.
- (7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

### **177 Duty to declare interest in proposed transaction or arrangement**

- (1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.
- (2) The declaration may (but need not) be made—
  - (a) at a meeting of the directors, or
  - (b) by notice to the directors in accordance with—
    - (i) section 184 (notice in writing), or
    - (ii) section 185 (general notice).
- (3) If a declaration of interest under this section proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.
- (4) Any declaration required by this section must be made before the company enters into the transaction or arrangement.
- (5) This section does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question. For this purpose a director is treated as being aware of matters of which he ought reasonably to be aware.
- (6) A director need not declare an interest—
  - (a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;
  - (b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or

- (c) if, or to the extent that, it concerns terms of his service contract that have been or are to be considered—
  - (i) by a meeting of the directors, or
  - (ii) by a committee of the directors appointed for the purpose under the company's constitution.

*Supplementary provisions*

**178 Civil consequences of breach of general duties**

- (1) The consequences of breach (or threatened breach) of sections 171 to 177 are the same as would apply if the corresponding common law rule or equitable principle applied.
- (2) The duties in those sections (with the exception of section 174 (duty to exercise reasonable care, skill and diligence)) are, accordingly, enforceable in the same way as any other fiduciary duty owed to a company by its directors.