

Advisory boards

- *Advisory boards provide advice but have no authority to govern. They can significantly benefit the organisation.*
- *Well designed terms of reference are best practice for advisory boards.*
- *A growing SME might find an advisory board a useful alternative to a full board structure.*

An advisory board is a body that provides advice to the board of directors or senior managers of a corporation but does not have authority to govern. It can be in the interests of a company to establish an advisory board to provide guidance and thought leadership outside of the formality of director appointments. It is customary to ask skilled and experienced individuals to join an advisory board and important to set clear expectations of the board at the outset. The usefulness of an advisory board will depend on a company's particular circumstances and requirements, therefore, no general recommendation is made on their desirability.

Advisory boards should have access to information that augments management knowledge. This includes knowledge about local metrics and data in the current social, legal, political and trading environment. An advisory board can give the company the opportunity to form associations with respected and influential people while not committing those involved to the time commitments of a director proper. Advisory board members can enhance a company's relationship networks and positively influence its reputation as board members become company advocates.

How should an advisory board operate?

It is most important that advisory board members are not unwittingly exposed to liability as full directors. For this reason it is essential the company have absolute discretion to accept or disregard any recommendations made by the advisory board.

The advisory board should have no powers of veto, instruction or direction – either actual or implied. These restrictions allow the advisory board to exercise its best judgement and offer advice in good faith but without the same responsibility as the full board for the outcome. Liability should remain with management and the board of directors for the success or failure of actions of the company, in accordance with the supervision of the full board.

An advisory board should be prepared to offer its collective opinion on a situation but provide no instructions or directives. In turn, the company should not be required to justify a decision that is contrary to advice from the advisory board.

Establishment

Structural similarities may exist between a board of directors and the advisory board. They should both have a chair to facilitate and lead, as well as formal procedures for the conduct of meetings.

The company's board of directors should establish an advisory board by a clear agreement in writing which would normally include details of:

- the advisory board's composition
- the mode and tenure of appointment of its members
- the means of appointing/electing the chair
- terms of reference including its objectives, purpose and activities
- the regularity and nature of meetings
- the basis for decisions
- the role and mode of appointment of any committees

- the entitlement of members to company information
- authorisation to communicate with external parties, including the media
- the relationship with, and access to, directors and management
- any area specifically excluded from its overview
- the mechanism for reporting back including the identity of the recipient (eg the CEO, board of directors or management), style of communication and frequency
- keeping of minutes and whether they are presented to the board of directors
- remuneration arrangements
- directors' and officers' liability insurance
- procedures for dealing with conflicts of interest.

It should also be made clear that the advisory board has no delegated authorities, cannot pass resolutions on behalf of the company or direct the CEO or other employees of the company and does not constitute a subcommittee of the board of directors. The advisory board is independent of the corpus of the company and should keep minutes of its deliberations.

Conflicts of interest

Members of the advisory board who become aware of a conflict of interest should disclose the nature and extent of the interest to both the advisory board and the board of directors. They should then withdraw, abstain or otherwise conduct themselves in a way that ensures the advice provided by the advisory board is unbiased. If minutes are kept, the conflict of interest should be recorded. As advisory board members do not make company decisions they may be able to participate in matters on which directors would be obliged by propriety to withdraw.

Confidentiality and trading restrictions

Advisory board members should observe strict confidentiality. Although independent of the company they can be exposed to inside information and therefore liable as *insiders* under current legislation. They should be subject to the same restrictions as directors in dealing in company shares.

Directors' liability

Advisory boards provide independent, collegiate wisdom to companies. The definition of director in the Companies Act (section 126) encompasses a wide range of activities.

Ultimately, the status of the advisory board will depend on its activities rather than the intent of its establishment. If advice is presented as directions or instructions then advisory board members may well fall into the director category. This should be taken into consideration before an appointment to an advisory board is accepted and while serving on an advisory board. It is another reason that minutes must be taken with care.

Other professional liability

In addition to potential directorial liability, it is possible that members of a paid advisory board could become liable for advice under the laws that make professionals responsible for their actions. Professionally qualified members of an advisory board may not be the only members at risk, which can be reduced by appropriate disclaimers, waivers, exclusions and indemnity arrangements. This includes ensuring the recommendations and records of the board use language that demonstrates the advisory nature of the advice. Prudent advisory board members might consider taking out appropriate indemnity insurance to cover the risk.

At the time the advisory board is established it is recommended that members seek proper professional advice on the directors' and officers' liability insurance relevant to their appointment.

Monitoring the CEO's performance

Advisory boards have been known on occasions to monitor the performance of CEOs of local New Zealand subsidiaries or branches on behalf of overseas corporations. However, the better practice is to leave these matters to the board.

Directors and management as members

To preserve the independence of an advisory board it is best practice that directors and management of the company are not also members of the advisory board. This will assist in emphasising the clear distinction between advisory board members and board and management. Nevertheless, the advisory board should expect to receive the information necessary to enable them to properly understand the company's business and performance. This means they are in a position to offer informed advice to the company (whether to directors or management) in accordance with the terms of their appointment. It is equally feasible that the advisory board can invite members of the company's board to be present on specific issues.

► SMEs: Advisory boards for SMEs

SMEs can particularly benefit from the guidance of an advisory board. SMEs use advisory boards as business development tools and adjuncts to strategic planning. Between two and four people might initially be appointed to the board and advisory board members could be utilised in a manner akin to a mentoring capacity. SMEs might consider arranging quarterly meetings with a formal agenda. It is useful to keep a running list of issues to be raised for consideration by the advisory board. ◀