

The Role of a Company Director

Course book



...market leaders for Director training

Course book

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The Role of a Company Director

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Programme

Day 1

What is a director and how are they appointed?

Directors' general duties under The Companies Act

Your personal liabilities as a director

Day 2

The role of the board in leading the company

The effective board and board meetings

The director's role in risk and crisis management

Course timings

The course runs from 10:00am to 1:00pm on both days

The room will be open from 9:45am

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The Role of a Company Director - Supporting Notes

This book will be a useful source of information
for you to refer to after the course.

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Session 1 – What is a director and how are they appointed?

What is a director?

- Dictionary definition:
 - A member of the board of people that oversees the affairs of a business
- A director is one amongst equals in the board room
- There are many types of director, not just the formally appointed:
 - Can be in action or deed
 - A director is defined in law according to what they do, rather than their actual job title

Types of director

- De facto director
 - A person not formally appointed to the board might be deemed a director if their role could be considered equivalent to that of a director, or if they have acted as a director
- Shadow director
 - A person in accordance with whose directions or instructions the directors of a company are accustomed to act (e.g. founder but not board member) - advisors excluded



Types of director

- Nominee director
 - Appointed to the board of a company to represent the interests of his appointor on that board
 - E.g. shareholder, a creditor or another stakeholder/funder
 - This puts such a director on a collision course with the duties he owes as a director to his company
- Alternate director
 - A person approved by the board, appointed by a director to act in their place if they is absent from a meeting
 - Has all the same responsibilities and other directors

Executive versus non-executive directors

- No legal distinction made between them
- Non-executive directors do not get involved in the day-to-day running of the business



How are the directors appointed?

- A company's first directors are chosen by the subscribers to the memorandum
- After that directors are appointed in the way specified by the company's articles
- The model articles say that directors may be elected by an ordinary resolution of the members and that the directors can appoint additional directors
- There must not be a legal bar on the person concerned

Question 1

Which of the following statements best describes the function and or status of a non-executive director?

1. Is one amongst equals
2. Exists primarily for Governance compliance
3. Provides constructive challenge to the board
4. Does not have the same legal responsibility as they are part time in the business
5. Often manage day to day organisational activities



In what circumstances must a director lose office?

- Death
- Resignation
- Removal by the members
- Bankruptcy
- Disqualification
- Appointment as auditor of the company

If the model articles for private companies apply:

- Composition with creditors generally
- Written opinion of registered medical practitioner concerning physical or mental health



Session 2: Directors' general duties under The Companies Act

Question 2

In company that is a going concern, to whom does a director primarily owe their duties to?

1. The shareholders / members
2. Their fellow directors
3. The company
4. The employees
5. The company's creditors

To whom are directors' general duties owed?

- Directors' general duties are owed exclusively to the company – not to individual members, not to third parties and not to so-called 'stakeholders'
- It follows that only the company can enforce the duties and be compensated for a breach



Can directors be exempted from the consequences of a breach?

- No they cannot be exempted
- Any attempt to do so, by the articles or a service contract, will fail
- However, the company can take out and pay for directors' and officers' indemnity insurance

How are the duties enforced?

- The duties may be enforced by an action brought by the company
- Such an action may be initiated in one of five ways:
 - By the members through the medium of a meeting
 - By the directors
 - By a liquidator
 - By an administrator
 - As a derivative claim brought by one or more of the members



What are the seven general duties?

- Duty to act within powers
- Duty to promote the success of the company
- Duty to exercise independent judgement
- Duty to exercise reasonable care, skill and diligence
- Duty to avoid conflicts of interest
- Duty not to accept benefits from third parties
- Duty to declare an interest in proposed transaction or arrangement

What is the duty to act within powers?

Directors are required to act in accordance with the company's constitution and to only exercise the powers for the purposes for which they are conferred



What is the duty to promote the success of the company?

- Directors must act in the way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole
- The purposes of the company are relevant to this
- In some circumstances the interests of the creditors come first

What must directors have regard to?

Amongst other matters they must have regard to:

- Likely consequences in the long term
- Employees
- Suppliers, customers and others
- The community and the environment
- High business standards
- The need to act fairly as between members

How can it possibly be enforced?



What is the duty to exercise independent judgment?

- Directors must use their independent judgment and not be unduly influenced by the wishes or instructions of others
- This could cause difficulties for a director put on the board to look after the interests of a particular person or sectional interest, or the interests of a holding company

What is the duty to exercise reasonable care, skill and diligence?

Directors must exercise the higher of:

- The general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as the director in relation to the company
- The general knowledge, skill and experience that the director actually has



What is the duty to avoid conflicts of interest?

- Directors must avoid a situation where they will have, or may have, a direct or indirect interest that conflicts with the interests of the company
- The duty is not infringed if it cannot reasonably be regarded as likely to give rise to a conflict of interest
- Subject to conditions the conflict may be authorised by the members
- Subject to the articles the conflict may be authorised by the directors

What is the duty not to accept benefits from third parties?

- Directors must not accept a benefit from a third party conferred by reason of being a director for doing (or not doing) anything as a director
- The duty is not infringed if it cannot reasonably be regarded as likely to give rise to a conflict of interest
- Subject to conditions, acceptance of a benefit may be authorised by the members



What is the duty to declare interest in a proposed transaction or arrangement?

- Directors must declare in advance an interest in a proposed transaction or arrangement with the company
- Disclosure is not necessary if the other directors already know or should know
- Disclosure is only necessary if the director knows or should know
- Disclosure is not necessary if it cannot reasonably be regarded as likely to give rise to a conflict of interest

Question 3 – Directors do's and don'ts

Give 2 things a director must do and 2 things a director must not do...

Must do	Must not do



Question 4

- A private company limited by shares has standard model articles and was incorporated on 4th October 2008. A director wants the directors to authorise her to have a conflict of interest.
- **Can they do this?**

Question 5

- A shareholder who owns 6 per cent of the shares wants (in the name of the company) to sue the directors for breach of the duty of care. The other shareholders do not want this to happen.
- **Can the shareholders do this?**



Exercise – RoadSmart

Background

RoadSmart is a limited company providing street cleaning and maintenance services whose main customer is the local borough council. It has been a successful SME and had ambitions to expand its operations but lacked the financial resources for its plans. Venture capitalists 3E have invested heavily to help RoadSmart develop its business. The bulk of its work is now with local authorities but it has had some small success in securing non-local authority work. However, it is still largely dependent on local authority clients.

RoadSmart has 4 executive directors and a non-executive chair:

- William Wyman – Managing Director
- Michael Jagger - Operations Director
- Keith Richards - Finance Director
- Charles Watts - HR Director
- Brian Epstein - Non-Executive Chair

There is also a representative from 3E on the board. His name is Mr Brian Jones. His brief is to keep an eye on the board and make sure that 3E gets its returns come what may.

3E has a Strategy Committee, external to RoadSmart, that formulates and enforces the implementation of the RoadSmart strategy through Mr Jones.

Current Situation

The business has been successful for two years, with all 3E targets being achieved. However, in recent times the local authorities, in the face of impending budget cuts, have become difficult to deal with resulting in contract scope and values being reduced and significant delays in the payment of RoadSmarts' invoices. This has led to cash flow problems compounded by their heavy dependence upon local government for business.

RoadSmart have attempted to secure other external business but the Strategy Committee has told the board it cannot do this as it a significant risk to their existing revenues.

At the last board meeting, Mr Richards announced that cashflow had further deteriorated and that insolvency was now likely. Mr Wyman is convinced they can trade their way out of trouble by getting additional business from other, yet to be identified, commercial clients and is trying to convince the board to continue. Mr Watts objects to this but is being shouted down by both Mr Wyman and Mr Jones (Jones is trying to protect 3E's interests).



Session 3: Your personal liabilities as a director

How worried should I be?

- Do not lose any sleep
- If you take your responsibilities seriously, you will almost certainly be alright
- There are more than 4,500,000 registered companies... only a very small number of directors have a serious problem

What are the risks of prosecution?

- The Companies Act provides more than 200 offences
 - There is also the Insolvency Act and other legislation
- Punishment on conviction is a fine and for some serious offences there is the possibility of imprisonment
- In practice some offences are virtually never prosecuted
- In almost all cases only directors in default will be found guilty



What is the purpose of disqualification?

- Disqualification is to protect the public
- The punishment will be a fine or possibly imprisonment
- In some cases there may be personal liability for company debts
- Disqualification may be imposed by a court or a disqualification undertaking may be given

What can result in disqualification?

- Conviction for an indictable offence
- Persistent breaches of companies legislation
- Fraud in winding up
- Summary conviction for a filing or notice default
- Unfit director of insolvent company
- Disqualification after investigation
- Disqualification for fraudulent or wrongful trading



What is fraudulent trading?

- This can arise in the case of winding up, not necessarily insolvent winding up
- It can occur if a director acts dishonestly
- The court can order the director to make a payment to the company
 - This is separate from possible prosecution

What is wrongful trading?

- Wrongful trading can occur from when directors know or ought to know that there is no reasonable prospect of the company avoiding insolvent liquidation
- Wrongful trading is a consequence of negligence
- Directors must put the interests of the creditors first
- The court can order one or more directors or shadow directors to make a contribution to the company's assets



Should I remember directors' general duties?

Yes you should remember:

- Duty to act within powers
- Duty to promote the success of the company
- Duty to exercise independent judgment
- Duty to exercise reasonable care, skill and diligence
- Duty to avoid conflicts of interest
- Duty not to accept benefits from third parties
- Duty to declare interest in proposed transaction or arrangement

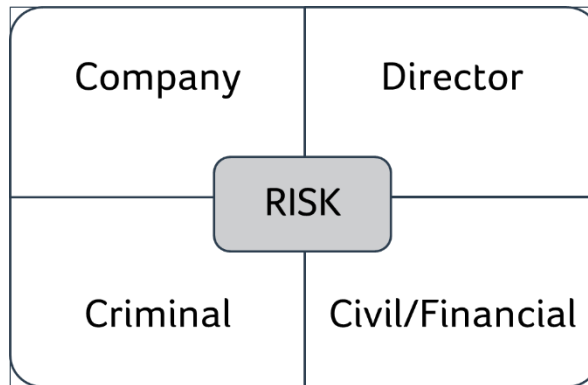
Question 6

Can fraudulent trading happen in the case of a solvent winding up?

Yes or No?



Risk



Director's risks

- Company insolvency
 - Possible personal liability
- Breach of duty to the company
 - Possible liability to compensate
- Disqualification
- Criminal offences
 - By the company or by the director



Health and Safety responsibilities

Organisations must:

- Provide a written health and safety policy
- Assess the risks to employees, customers, partners and any other people who could be affected by their activities
- Arrange for the effective planning, organisation, control, monitoring and review of preventive and protective measures
- Ensure they have access to competent health and safety advice
- Consult employees about their risks at work and current preventive and protective measures

S37 Health & Safety at Work Act

Proceedings under HSWA s.37 will require proof of the following elements:

- That an offence has been committed under any of the relevant statutory provisions by a body corporate
- That the offence has been committed with the consent or connivance of or has been attributable to any neglect on the part of the accused; and
- That the person accused is a director, manager, secretary or other similar officer, or a person purporting to act in any such capacity, or a member of a body corporate whose affairs are managed by its members



Corporate manslaughter

- Organisation is guilty **if the way in which its activities are managed and organised...**
 - Causes a person's death, and
 - Amounts to a **gross breach of a relevant duty of care** owed by the organisation to the deceased
- But only if...
 - The way in which the organisation's activities are managed or organised by its **senior management** is a substantial element in the breach

Effect of conviction for corporate manslaughter

<p style="text-align: center;">Unlimited fine</p> <ul style="list-style-type: none">• 2.5% to 10% of average annual turnover	<p style="text-align: center;">Remedial order</p> <ul style="list-style-type: none">• Take steps to remedy management failures
<p style="text-align: center;">Publicity order detailing</p> <ul style="list-style-type: none">• Fact of conviction• Particulars of the offence• Amount of fine• Terms of remedial orders	<p style="text-align: center;">Wider issues</p> <ul style="list-style-type: none">• Risks to reputation• Civil liability• Morale



Examples of HSE prosecutions

CAV Aerospace Ltd



- fined £600,000 for corporate manslaughter
- Plus £400,000 (concurrently) for breach of HSWA
- Plus £125,000 costs “repeated and explicit warnings” about unsafe stacking

Examples of HSE prosecutions

Peter Mawson Ltd

- Fined £200,000 for corporate manslaughter
- Also fined £20,000 for Health and Safety breach.
- Owner of company
 - Sentenced to 8 months in prison,
 - Suspended for two years;
 - 200 hours unpaid work;
 - A publicity order to advertise what happened on the company website for a set period of time,
 - And to take out a half page spread in the local newspaper; and pay costs of £31,504.77



Guidance

- Intended as a flexible guide
- Six main principles for bribery prevention
- Contains a summary of offences
- Some specific issues are covered

“reasonable and proportionate hospitality or promotional expenditure... recognised as an established and important part of doing business”

Guidance: the six principles

- Proportionate procedures
- Top level commitment
- Risk assessment
- Due diligence
- Clear communication – including training
- Monitor and review



Difficult areas

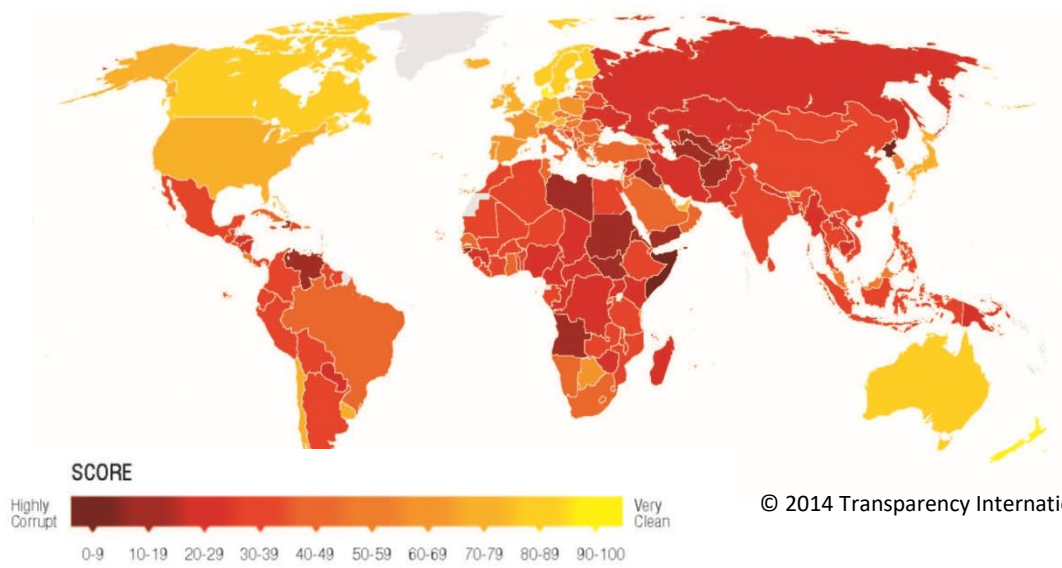
- Agents
- 'Facilitation payments'
- 'Lavish' entertainment
- Gifts
 - Value and frequency
 - Approving and recording

Actions

- Know the legislation and potential impact on business
- Assess the risks – geographical and business type
- Commit the company against bribery and corruption
- Agree a written policy
- Adopt and integrate systems and procedures
- Provide training for employees
- Implement - Evaluate - Improve



Risk heat map



Question 9

- One of your company's major suppliers wants to take you and your partner to the FA Cup Final. Transport and hospitality will be provided. You would both like to go.
- **What should you do?** (Type your answer in the chat box)



Money laundering

“The process by which criminals disguise the original ownership and control of the proceeds of criminal conduct by making such proceeds appear to have derived from a legitimate source.”

- Placement
- Layering
- Integration

Question 10

You have a reasonable suspicion that one of your customers is engaged in money laundering.

- There are a number of actions you are considering:
 1. Contact your responsible person in your organisation
 2. Withhold payments
 3. Contact their CEO to discuss your concerns
 4. Turn a blind eye, it's their business not yours
 5. Contact National Crime Agency with details
 6. Business as usual with the company

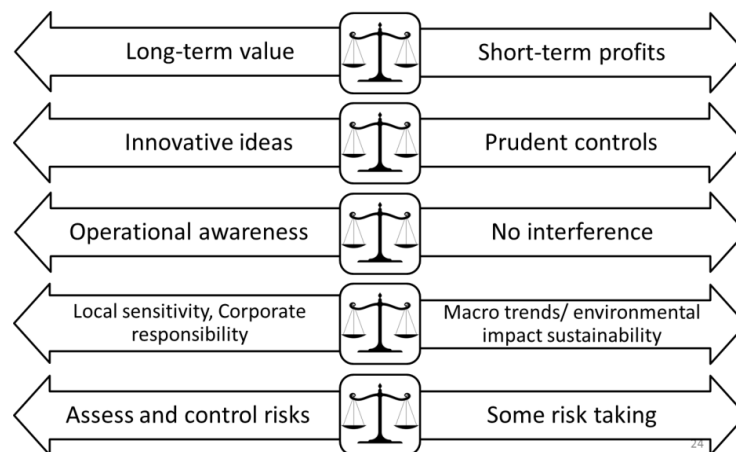
- **What actions *should* you take?**



The role of the board

- Joint and severally responsible for its action (applies to all directors)
- Set the organisation's **vision, purpose** and **values**
- Set the organisation's **strategic aims**
- **Entrepreneurial leadership**, with **prudent** and **effective controls**
- Ensure necessary **capabilities** (including financial resources) are in place
- Review management **performance** and **behaviour**
- Ensure **obligations** to shareholders and other stakeholders are understood and met
- Deal with the inevitable paradoxes of organisations

The board's inevitable paradoxes and dilemma





Leadership

What is leadership?	<i>'The art of getting someone else to do something you want done because he (or she) wants it done' (Eisenhower)</i>
How do you know that you are a leader?	Leaders have followers. A leader without followers is just a person!
Leaders can be 'official' and 'unofficial'	Not just what the organisation chart says!

Leaders decide what should be done
Managers make sure it is done...

Question 11 - Characteristics of a leader

What do you think are the characteristics of a good leader? *(Type your answers in the chat box)*



Vision, purpose and values

- Vision
 - A clear and compelling view of what the future of the organisation could be
- Purpose
 - Describes why the organisation exists, the business the organisation is in today (i.e. markets and customers)
 - ‘Why is the work we do important?’ rather than ‘What does the organisation do?’
- Values
 - Indicate how to behave while delivering the vision

Organisational vision

Directors should:

- Describe the vision in a way that generates commitment and support
- Translate the vision into strategy and business objectives
- Align the vision with the corporate values
- Assemble sufficient organisational capability (competencies, capacity and culture) to successfully pursue the vision and strategy
- Drive processes that allow strategic adjustment in response to changing circumstances, while remaining focused on the vision

The vision is what keeps everyone going when they have a bad day!



Setting the tone

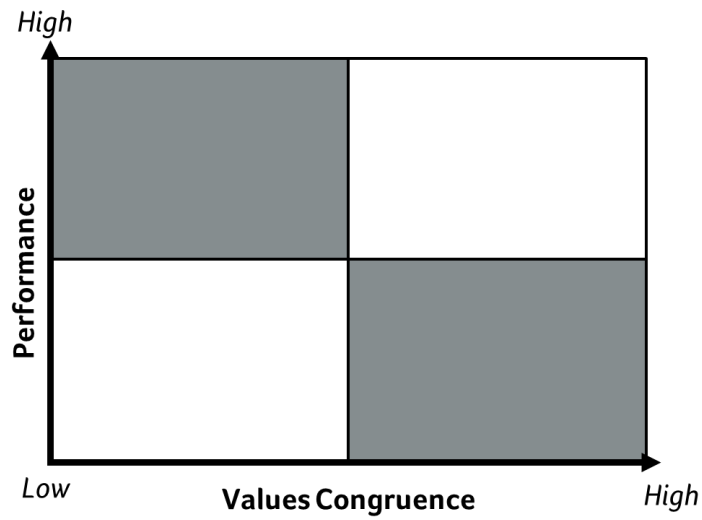
- The tone of an organisation is set by the current leaders
- Successful leaders align:
 - Their agreed **values** and **beliefs**
 - **Strategic decisions** that are consistent with those values and beliefs
 - Their **own behaviour** that is consistent with both their espoused values and the decisions they have collectively taken

Personal values

- Individuals must be clear about their own values and life goals
- People who know what they are looking for in life are clear if their job meets their needs
- People who like what they do tend to perform better and with real enthusiasm
- People without a clear sense of their values tend to be indecisive
- Link between organisation and personal values
- Goal is to achieve values congruence



Values vs performance after Jack Welch



Values and corporate responsibility

- If organisations have an espoused value set this should be visible in:
 - The behaviours of the directors and employees
 - The actions the company follows
 - The way it interacts with its environment
- This is often encompassed under the heading of corporate responsibility



Board teams

Board team differs from 'normal' organisational teams

- It is 'permanent' structure but sometimes with temporary members e.g. fixed term appointments
- Board composition, roles and responsibilities are clearly defined
- Board members can face significant external scrutiny and are responsible for the long-term success of the whole organisation
- There may be strong and conflicting egos

Power of teams

"...the more I look at the history of business, government, the arts and the sciences, the clearer it is that few great accomplishments are ever the work of a single individual... the problems we face are too complex to be solved by any one person or any one discipline..."

Professor Warren Bennis



What do great board teams look like?

- External perspective
 - Lack of mistakes
 - Quality of output and performance
 - The 'buzz' in/around the team
 - Team members enjoy it
- Internal perspective
 - Clear vision and sense of purpose
 - Talent and skill
 - Balance
 - Motivated discontent
 - Discipline and positive politics

Remote / Virtual team challenges

Virtual (dispersed) teams require:

- Enhanced task and functional support
- Stronger psychological, social and emotional support
 - Need to be loved and feel part of the team
- Need face time with their peers

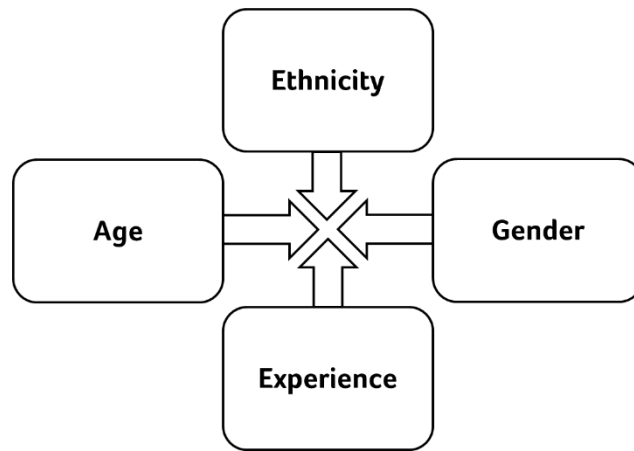


Technology can help the effectiveness of remote teams

- Traditional technology in the boardroom
 - PowerPoint
 - Teleconference
 - Video conference
- More sophisticated use of technology
 - Teams
 - Zoom
 - Adobe Connect
 - Electronic distribution of board papers
 - Electronic minute taking
 - Realtime voice translation
 - Virtual and augmented reality

Diversity on boards

The 'big four'



Dysfunctional boards

- Lack of trust and/or respect
- Secret meetings and/or special interest cabals
- Different agendas and/or personal agendas
- Dominant individual members with poor board/team skills (especially if chair or CEO)
- Weak or non-participating members
- Political/vested interests
- Lack of confidentiality
- Disorder, poorly structured meetings, lack of discipline
- Inability to effectively apportion time/attention to future thinking over current demands
- Groupthink



Question 13

What is the role of the chair in your view?

Which of the following statements best describes the role of the chair?

1. The board debates the issues and the chair makes the final decision
2. The chair leads board
3. The chair leads the company
4. The chair is one amongst equals on the board
5. The chair and CEO roles are interchangeable

The role of the chair

- The chair leads the board
- Challenges possible instances of groupthink
- Assigns devil's advocate role to several strong members of the board
- Divides board into two groups to evaluate feasibilities
- Scans for warning signs from rival groups and competitor organisations
- Ensures residual doubts are expressed
- Seeks opinions from outside experts and talks to confidants
- Good governance



What contributes to an effective board?

COMPOSITION OF BOARD
Balanced board – knowledge, experience, character

AGENDA
Focus on...

- Strategy
- Performance
- Value creation

ROLE OF THE CHAIR

- Leadership
- Encouraging engagement by all directors

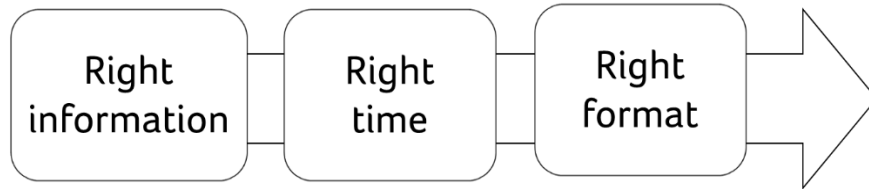
WELL INFORMED DECISIONS

- Reports
- Advice



Session 5: The effective board and board meetings

Information coming to the board



Board discussions





Board meetings – what are they and why have them?

- Formal meeting of the board of directors of an organisation
- Held at definite intervals
- Consider policy issues and key risks opportunities and issues
 - Policy include vision purpose strategy and values (Garrett)
- Presided over by a chair (or their appointee)
- It has quorum requirements
- Its deliberations must be recorded in the minutes
- Under the doctrine of collective responsibility, all directors (even if absent) are bound by its resolutions

A good board agenda

- Opening
 - Apologies
 - Director conflict of interest disclosures
 - Previous minutes
 - Confirmation
 - Matters arising/action list
- Matters for decision
 - Major strategic decisions
 - Routine decisions
- Matters for discussion
 - Update on strategic plan implementation and review
 - Discussions concerning forthcoming strategic decision
 - Chief executive officer's report
 - CFO's report
 - Chairs report



Session 6: The director's role in risk and crisis management

What is risk?

- Risk can be defined as the combination of the probability of an event occurrence and the impact of its consequences
- Include civil and criminal consequences
- Can be corporate and or personal
- This can drive behaviour
 - Risk aversion v some risk taking
 - Entrepreneurialism v recklessness
- An issue is an actual current event; a risk may not happen
- An upside risk = an opportunity

Calculated risk

“Risk is like fire: if controlled it will help you; if uncontrolled it will rise up and destroy you.”

Theodore Roosevelt



Principles of risk management: the Turnbull report

- Turnbull asks - Does your company:
 - Assess risk
 - Control risk
 - Know about and communicate risk
 - Monitor risk
- What to do with risk:
 - Treat
 - Tolerate
 - Transfer
 - Terminate
- All help build a risk culture

Question 14

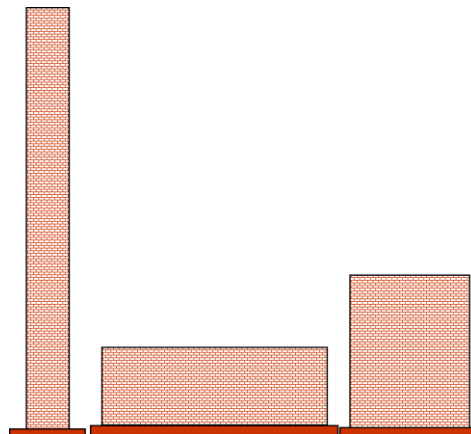
Defining risk appetite

- How would you articulate or quantify your board's appetite for risk?
- What's the difference between risk **appetite** and risk **tolerance**?



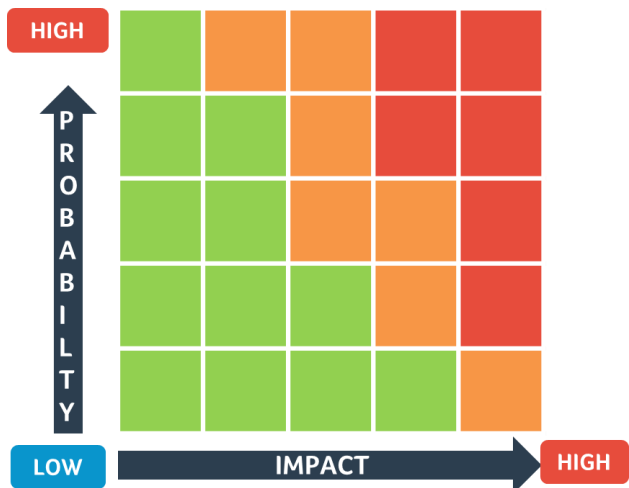
Risk appetite

- Each wall is 40m2; is the construction risk identical?
- What sort of company will get the contract for building the tall wall?
- Nothing ventured, nothing gained
 - Ability to take risks is a competitive discriminator
 - Your ability to handle risk brings opportunities



Probability impact grid

- Most common simple form of risk assessment
- How likely is it?
- What is the severity of impact?
- Structured & auditable
- BUT – what are the unknowns?





Assessing risks – some questions

- Do you understand your internal risks?
- Do you understand your external risks?
- How do you assess possible risks and who is involved in this process?
- Can you prepare for unknown risks?
- Who runs the process?
- Who owns the process?

Integrate strategy and risk management!

Risk vs entrepreneurial decisions

The UK Corporate Governance Code sets out the Board's role

"...to provide entrepreneurial leadership within a framework of prudent and effective controls that enable risk to be assessed and managed"



When risk becomes a crisis

- The level of a crisis can be defined by the seriousness of the threat it presents
- The seriousness of the crisis determines the level and urgency of response
- Gene Klann characterises crises on three levels:
 - Level 1 – organisation will be publicly embarrassed and the delivery of its vision, purpose and values threatened
 - Level 2 – the crisis could result in personal injury, some property loss, possible loss of life, possible reputational damage
 - Level 3 – the crisis would result in loss of life, significant property loss, reputational damage, threaten the organisation’s survival

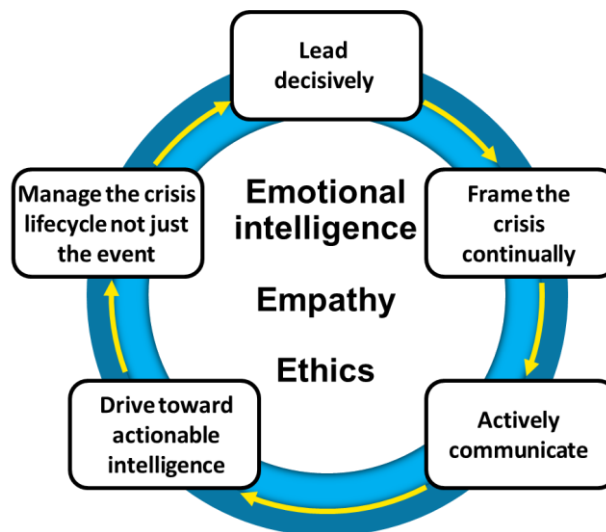
Sources of crisis

- Terrorism
 - Sept 11 twin towers
- Cyber attacks
 - Ashley Madison
- Technology failure
 - Challenger
- Natural disaster
 - Coronavirus
- Flooding
 - Somerset Levels
- White collar crime
 - Enron
- Accident
 - BP Deep Water Horizon
- Ethics and values Breach
 - Oxfam

Board role in a crisis situation

- Crises *will* happen... so plan accordingly
- The role of the board changes in times of crisis from:
 - Business as usual to crisis containment and resolution
- The board and/or its crisis leaders will be dealing with incomplete information and therefore uncertainty
- Every crisis has a pace of its own
- The organisation will need to change tempo accordingly and reprioritise what is now critical for the business

Crisis leadership – Deloitte’s Model



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