

The Public Sector Corporate Governance

By Imelda Reynolds



The responsibilities of company directors are clear but what about the responsibilities of those who serve on public boards? Imelda Reynolds examines the legal responsibilities of members of our statutory boards and authorities.

What exactly is the legal status of, and what are the responsibilities of those individuals who sit on the boards of public bodies and authorities? This question is particularly relevant today when such board members are concerned about ensuring they perform their duties to the highest standards of probity and accountability.

The legal responsibilities of public body members depend on the form of legal entity that establishes the particular public body. There are two types of legal entities:

- ▶ Companies registered under the Companies Acts 1963-2006
- ▶ Companies, boards or authorities incorporated by statute

Although some public bodies are 'forums' or 'taskforces', these do not have a separate legal personality – they are generally convened for a specific purpose and are given defined terms of reference.

Public bodies registered under the Companies Acts

Some public bodies are companies registered under the Companies Acts 1963 to 2006. Board members of a registered company are directors within the meaning of the Companies Acts and are subject to the statutory and fiduciary obligations imposed on directors by statute and common law. These State-controlled companies are established by special

statutes, which allow them to become incorporated by registration under the Companies Acts. Examples are The Dublin Airport Authority plc, and An Post plc.

Statutory corporations

The second type of legal entity is a company, board or authority incorporated by statute. These statutory corporations may be incorporated without having to observe the requirements of the Companies Acts. This was a popular means of conducting large scale enterprise in the past, such as railways and canals. Currently, statutory corporations are used to conduct State-controlled public utilities and for bodies with special purposes.

Statutory framework

The starting point is to review each statutory authority's enabling legislation as this is what creates the agency and gives it a legal personality. Each statutory body is different and different pieces of legislation may confer additional powers. For example, some entities have a 'two tier' structure, with an executive board and an advisory council. Others have no board at all.

It is also interesting to note that the enabling legislation will generally outline the role and function of the Chief Executive Officer (CEO), but not that of a board member.

Fundamentally, a statutory authority's core powers and responsibilities will be laid out in its enabling legislation (as may be amended).

When a range of enabling legislation for a variety of agencies is considered, a number of common provisions in the legislation establishing these agencies can be identified:

- ▶ The establishment of the authority, board, council or commission as an entity with perpetual succession, power to sue and be sued in its corporate name, and to acquire, hold and dispose of land;
- ▶ The designation of the functions of the board, normally involving mandatory language such as 'The Board shall ...' Sometimes these extend to an entitlement for the statutory authority, with the consent of the Minister, to form subsidiary companies and for those subsidiaries to enter into joint ventures;
- ▶ The designation of the membership of the board, including the board's composition, its chairman, the number of members, their appointment, etc.;
- ▶ The proceedings of the board, covering issues such as the number and frequency of meetings, calling of meetings, board quorum, voting and casting votes, the power for the board to adopt standing orders and the entitlement to set up board committees;