

ORGANISATION

Advisory boards

Advisory boards (also known as advisory panels, advisory committees, advisory councils) are a group of suitably experienced people appointed to give considered advice, recommendations or counsel in connection with a business, corporate or other organisational purpose.

Advisory boards have no binding decision-making authority or executive function in the context of the relevant business, corporation or organisation.

Advisory boards are distinct from a board of directors, management committee or council in whom the governance, direction and management of a corporate entity may be placed in the terms of the *Corporations Act 2001 (Cth) (Act)*, state/territory-based associations incorporation legislation or other statutory enactment by which the relevant corporate entity is constituted.

Although members of advisory boards may be expected to act with due care, they are not fiduciaries charged with fiduciary duties and responsibilities.

Advisory boards generally have no recognised legislative or regulatory mandate or constitutional base, although there may be exceptions particularly in the public sector.

Advisory boards are more often constituted in the terms of an organisation's governance arrangements, be they formally set out in a charter or less formally adopted in the terms of an organisation's cultural practices.

The terms of an advisory board's remit, constitution, function, accountability and responsibility should be set out in a documented charter or terms of reference. Typically, that charter or terms of reference will also prescribe the desired skills and experience of the advisory board's members, who appoints them and the term and basis of appointment, and any remuneration, stipend or honorarium that may go with the appointment.

Care needs to be taken that advisory board members, by the structure of their office and functions or by the practice of the performance of their role, do not become *de facto* or *shadow* directors with the attendant additional duties, responsibilities and personal liabilities involved for a *director* of an organisation. This is further discussed below.

Advisory boards commonly may be found in the following environments:

- In support of a proprietary company board seeking to transition the corporation through inter generational succession planning or towards public status;

- In support of a corporation expanding to new geographical or operational markets by bringing specialist skills, experience, knowledge or business networks to the corporation's main or statutory board's considerations;
- In support of a government Minister's portfolio responsibility by bringing diverse stakeholder perspectives to a statutory function or mandate;
- In support of a small-to-medium enterprise by bringing new perspectives to develop the business and by providing networking opportunities through the experience and expertise of the advisory board members;
- In support of the managing committee or board of a community-based association by bringing specialist experience or knowledge to a particular function or aspect of endeavour of the association.

How is an advisory board different to an ordinary board?

Directors of an organisation's main board generally have fiduciary duties, including a responsibility to act in good faith in the best interests of the organisation and for a proper purpose. For companies incorporated under the Act, these duties are set out in ss 180-183 of that Act. The members of the main board are generally responsible for corporate outcomes, and conformance with legal and regulatory requirements. Directors can be held legally liable for not fulfilling these duties. Similar fiduciary duties generally apply to directors of other organisations as well.

Members of an advisory board, on the other hand, are not 'directors' for the purposes of relevant legislation or at general law. Their role is defined by the terms of reference by which the advisory board is constituted or by which the advisory board acts in practice. Generally, its members owe no fiduciary duties to the organisation or its members or shareholders. Roles for advisory boards will vary between organisations but generally they will relate to providing objective advice, insights or recommendations. They have no authority to act on behalf of the organisation.

While they technically have no legal liability as directors of the organisation, it is advisable, as noted above, to confirm the role of advisory board members in a charter or terms of reference stating the scope and limitations on their authority and the non-binding nature of their advice. This will assist to avoid confusion as to the scope of their role and function.

What are the roles and responsibilities of advisory boards?

The roles and responsibilities of advisory boards generally will be determined to best suit the organisation's particular circumstances and needs. These roles, responsibilities and expectations of the advisory board should be formalised in a charter or terms of reference which is approved or ratified by the main board. As there is no legal or formal definition for advisory boards, the organisation can structure its advisory board in the most appropriate fashion having regard to the organisation's needs and the attributes and availability of the advisory board members.

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Organisations must be clear on the purpose of the advisory board and what they hope it will achieve. This will help determine the skills, knowledge and experience needed and assist in the selection of members of the advisory board. Effective communication of a clearly defined purpose will contribute to the success of the advisory board.

Good advisory boards can give fresh insights and thinking on emerging or unfamiliar issues, respond to ideas from management, play devil's advocate and supply high quality objective advice to support the main board's decision-making. Members of advisory boards are often selected because of their skills, experience, network contacts and their ability to facilitate introductions to potential suppliers, customers, etc.

Other roles and responsibilities for advisory board members might include the following:

- Develop an understanding of the business, market and industry trends;
- Provide *wise counsel* on issues raised by the owners/directors or management;
- Provide the directors and management with insights and ideas which can only come with distance from the day-to-day operations;
- Encourage and support the exploration of new business ideas;
- Act as a resource for executives;
- Monitor business performance and challenge the directors and management to consider options for improving the business;
- Utilise their contacts and networks to introduce the organisation's management to people and other organisations who can assist the organisation. For example, these may be potential customers, suppliers, financiers or advisors such as lawyers and accountants.



When considering setting up an advisory board, an organisation should understand the issues on which the advisory board will contribute and then determine the experience, skills and attributes that are best placed to assist.

What are the benefits of having an advisory board?

Having an effective advisory board can bring benefits to an organisation including:

- Drawing on the experience, skills and knowledge of people who have practical experience in the business or strategies of like industry organisations;
- Enhance the organisation's reputation and credibility in the marketplace;
- Increase consumer and investor confidence;
- Gain the benefits of an advisory board's inputs without the complications and risks of the advisory board members becoming members of the main board.

An added benefit is that, in the longer term, the advisory board may be a source of potential directors for the main board. The advantage is that these people are familiar with the organisation, its strategic objectives and key people, and could make a meaningful contribution early on in their appointment.

In family companies, setting up an advisory board can be a way to test the quality of contribution that can be made by outsiders and could be a precursor to appointing an outsider to the main board.

When may a company need an advisory board?

There are many situations in which an advisory board may prove valuable to a company:

- Guiding start-up companies in a rapid growth phase;
- Creating a new product line;
- Moving into a new market segment or industry;
- Moving into a new geographic area;
- Making the transition from private to public and perhaps leading up to listing on a stock exchange;
- Restructuring and repositioning a company in the market;
- Implementing major new technology within the organisation;
- Staving off a serious competitive threat;
- Analysing a potential takeover target.

Who sits on advisory boards? How do you find them?

A wide array of advisers is available to organisations. When considering setting up an advisory board, an organisation should understand the issues on which the advisory board will contribute and then determine the experience, skills and attributes that are best placed to assist. This will mean targeting advisers for their specific skills, e.g. if a company is expanding into a new market, ensure that at least one advisory board member has knowledge of this market.

Typical members of advisory boards may include:

- legal advisers;
- accountants;
- marketing experts;
- HR experts;
- financial advisers;
- entrepreneurs;
- industry experts;
- technical experts;
- information technology experts;
- social or industry sector representatives: for example, consumer advocate, union representative, employer representative; and
- semi-retired business people who have a depth of relevant industry experience.

What legal liabilities exist for members of advisory boards?

The directors of a company's main board owe fiduciary duties of good faith and care to the organisation and can be liable if they fail to meet these obligations. Technically, advisory board members do not owe these duties as they are not directors. However, they may owe other contractual and tortious duties consistent with the terms of reference or charter of the advisory board and the responsibilities and expectations of appointment.

Without clear lines of demarcation between the roles of the advisory and main board, there may be circumstances where a court thinks that the main board relies on the advice of the advisory board without giving it due analysis and consideration, particularly if there is a negative outcome for the organisation. This may lead to accusations that the advisory board members are acting as *shadow* or *de facto* directors. A shadow director or a *de-facto* director is deemed by legislation and the general law to be a 'director' and will be liable for breaches of directors' duties.

A *de-facto* director is a person who is not actually appointed as a director but acts as if he or she were (often incorrectly believing that he or she has been properly appointed as a director). In some cases, informal involvement in the decision making of an organisation can lead to a *de facto* directorship.

A shadow director is also not appointed as a director but is a person on whose instructions or wishes an organisation's board members are accustomed to act. These are understandably complex areas which advisory boards wish to avoid.

Documenting a formal charter or terms of reference outlining the duties and responsibilities of the advisory board will help to properly distinguish its role from that of the main board. This minimises the chances of directorial liability for advisory board members. The charter should include statements about the advisory board members not being appointed 'directors' and having no authority to act on behalf of the organisation or to make decisions. The charter should also clearly state that the advice or recommendation given is non-binding. Directors on the main board are still expected to discuss, debate and decide on a course of action themselves, having considered the advice of the advisory board.

To protect the organisation, the charter or terms of reference of the advisory board should make it clear that the advisory board members should be acting in the best interests of the organisation and not for personal gain. Their agreement with the organisation should include a condition requiring disclosure of potential conflicts of interest and maintaining confidence of office and information received as an advisory board member.

Potential advisory board members should undertake a similar level of due diligence on the organisation as they would when joining a main board. They should assess what access they may or may not have to indemnification or directors and officers liability (D&O) insurance as these generally apply only to an organisation's directors and officers.

When establishing an advisory board, expectations must be clearly communicated to the members:

- What will the term of office?
- What is the expected time commitment?
- What is the expected contribution of each member?
- How frequently will meetings be held?
- What is being offered in return?

These matters desirably should be captured in a letter of appointment annexing a copy of the charter or terms of reference for the advisory committee itself.

Advisers may feel that their time is being wasted if the advisory board is not well organised. Meetings should be run efficiently and effectively:

- Prepare an agenda and seek input from participants;
- Distribute information in advance;
- Stick to time when running the meeting;
- Follow up on actions;
- Keep minutes;
- Keep members informed of developments and activities between meetings.

Keeping minutes can be a useful way of confirming that the advisory board's role is purely advisory and that they are not acting on behalf of the organisation or making decisions.

Should advisory board members be paid?

This is a matter for each organisation to decide for themselves in negotiation with the proposed advisory board member(s). Some organisations may reimburse advisory board members for out of pocket expenses; some may provide a good lunch; others may pay per meeting attended; others may pay a retainer or give their advisers a small amount of equity in return for their services. If advisory board members are to be remunerated or given shares in the company, it is advisable to have a contract setting out each advisory board member's rights and obligations.

Advisory board members may benefit in non-financial ways from their involvement. They may become exposed to new ideas, expand their networks, use their skills and knowledge in new ways without the burden of fiduciary duties and possibly enhance their credibility if associated with other people of influence and business/community standing on an advisory board.

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