

TOP 10

Ten things board directors should know about the board's powers (that CEOs might not want them to know)

The board and the chief executive officer (CEO) both have leadership roles in an organisation, but they have different powers over decisions affecting the organisation. We often divide their powers into “governance” and “management”, but it’s not that simple. The CEO has much more knowledge than the board about the intricacies and context of the organisation, so can often suggest strategic best practice, while the board is well placed to ask questions that might sound like management questions but help to ensure accountability.

1. Is the board entitled to ask annoying or inconvenient questions of the CEO?

Yes. The board can ask questions that the CEO perceives as derailing decisions, as wasting time because they require reports to be generated, or as overly detailed. Even if the topics of the questions fall outside the board’s remit, it is entitled to ask them. The CEO must grin and bear it.

Asking inconvenient questions is part of what the board is there for, and finding a way around board blockages is what the chair and the CEO are for, as a team. And every now and again, the board’s silly question nails exactly the point that everybody has overlooked. Planning is important, but the job is not done till the governance is finished.

However, the relationship between the CEO and the board is important for an organisation’s sustainability and brand, so the board should be weary of creating work for the CEO that will distract them from working towards the core mission of the organisation. While any board member can ask any stupid question they wish of the CEO, it is up to all board members to manage one another.

2. Is the board entitled to ignore conflicts of interest?

The board is not entitled to ignore conflicts of interest, though it can do so without ramification.

However, if the board does ignore conflicts of interest, the most significant impact is likely to be on the organisation itself. Conflicts of interest lead to bias, lack of due diligence, and hence poor decision making.

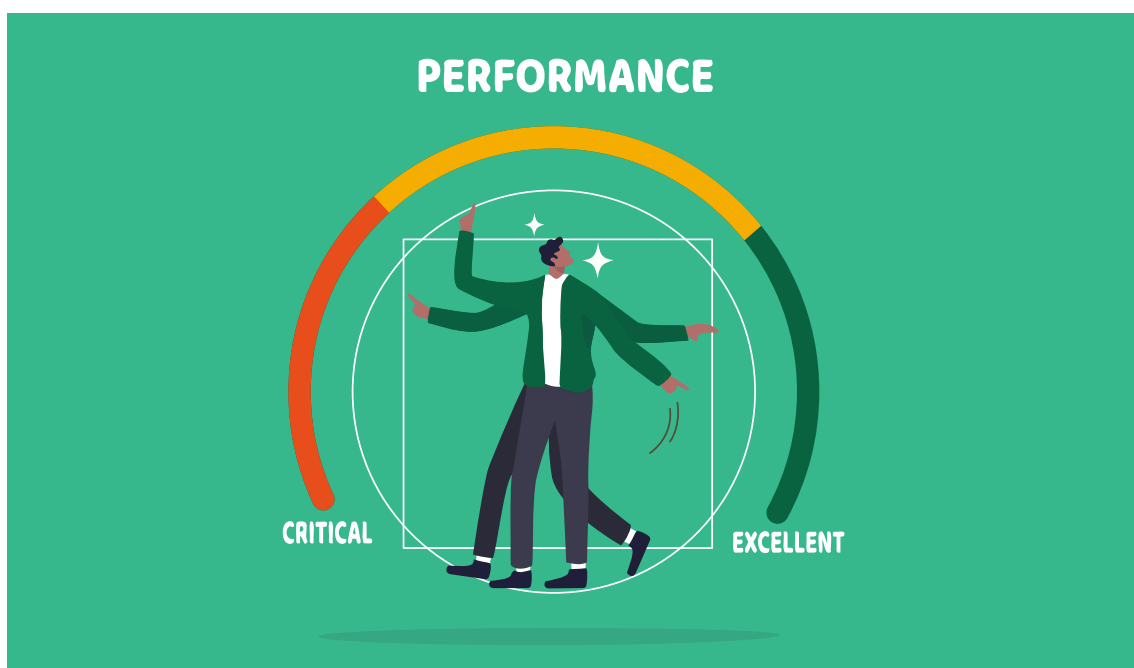
When the board ignores a conflict of interest, it also contributes to a culture characterised by a lack of trust, particularly between the board and the CEO and staff team; the last two cannot trust the board to carry out good decision-making processes.

A third consideration is the impact on the organisation's branding and its reputation among customers, volunteers, donors and other stakeholders. They may rightfully question the integrity and the competence of a board which is ignoring conflicts of interest.

3. Must the board take its annual performance review duties seriously?

There is literature in support of and against formal annual reviews as a vehicle for staff motivation.

However, it is the board's role to ensure the organisation is fulfilling its aims, and to this end, a review of the CEO's work should be completed annually. As the CEO reports to the board, it is the board's role to carry out this review. It is good practice to delegate this role to a subcommittee which can preserve confidentiality, focus on the mission, and report back to the board. The CEO may not enjoy the process of the annual review, but it is important for the board, as it provides data to underpin their confidence that the organisation is doing well or to help them to consider new strategies.



4. Is the board entitled to breach the constitution?

Sometimes board members regard the constitution as “guidelines” rather than rules. There may be no ramifications for the board that breaches the constitution – no regulator is likely to take an interest – but this doesn’t mean it should do so.

The CEO can plead with the board to avoid breaching the constitution but cannot prevent it, even though they will be the one to pick up the pieces after the board’s behaviour has caused problems. A constitution is binding on the organisation’s members, and the CEO sometimes is a member. If they are not, they have no standing to appeal to the constitution’s provisions. They cannot appeal to regulators, at any level. The CEO does not even have the authority to call a special general meeting to reconsider the actions of the board.

However, breaching the constitution brings with it risks of litigation, organisational rupture and reputational damage.



5. Can the board delegate responsibility for policy formulation to the CEO?

Every organisation has or should have a slate of policies. Policies, as distinct from procedures (see the examples in the ICDA policy bank to clarify which), are very much the business of the board.

In most small to medium organisations, the board should approve (or ratify, or adopt) each policy, individually, because policies should be important influences on how the organisation conducts itself, and the board is charged with getting them right.

The board should ideally consist of members with diverse outlooks and experiences who can identify unintended consequences or missing details in policies if given the opportunity to read them and provide comment.

On the downside, having the board approve policies can create bottlenecks if the CEO wants to have new policies passed quickly and the board is not meeting regularly or cannot agree to approve them.

Another option sees the CEO deputised to write policies, update them regularly, and submit changes for approval, and the board can pass them on the nod, if it wants to. If the board does not look at the policies at all, it is unlikely to know what they say, and that would make it difficult for the board to take them into account in its decision-making, which, given they are the organisation's official policies, it should.

If the CEO disagrees with a suggested policy or point in a policy, and the board decides to pass it, there is nothing the CEO can do.

However, it is important to acknowledge the damage this is likely to cause to the CEO-board relationship and to question if there are other competency or cultural problems in the organisation.

6. Can the board withhold the board minutes from the CEO?

The board is not obliged to share minutes or updates with the CEO.

However, it is difficult to see how an organisation and a CEO could function without them. A CEO should usually expect to receive a copy of the minutes, although it's possible that there might be an alternative mode of letting them know what the board has decided. The CEO's responsibility is to carry out the decisions of the board, which is hard to do if they do not know what they are. This includes strategy, ongoing actions, the annual budget, and budget decisions made throughout the year.

It must be noted that the board is entitled to run "in camera" sessions before or after a board meeting which exclude the CEO. The minutes of these sessions need not be shared with the CEO as they should not include any discussion of strategy which the CEO should be party to.



7. Can the board let an employee stand for the board and get elected?

The board can allow a current employee to stand for the board and be elected. There is no general rule, or even a guideline, that no staff member can serve on a board: many boards have the CEO as an ex officio or even voting member. Some boards have an elected staff representative, and few have a specific prohibition in place. If a person has been elected to the board by the members in the knowledge that they were an employee, the members (who can in this matter instruct the board) are happy with this situation.

No board member, by themselves, can make any decision; they have influence only if they can persuade the rest of the board to follow them. Moreover, if you have a proper division of duties the board is not going to be making the kind of detailed decisions that would advantage a particular person. If the board has general confidence in its robust decision making and culture, there is less reason to be concerned than if decision making is often fraught.

However, there are two key grounds for concern. First, if an employee is to be placed in a position where they have authority over the CEO who is their day-to-day boss. Second, if a person is to be placed in a position where some of their votes may involve a conflict of interest. If this happens, the laws, regulations, and rules regarding conflicts of interest come into play, and the staff member will need to stand aside while the decision is made.

8. Can the board ask for any piece of information they want? And can they ask for information from one of the CEO's subordinates?

The board can ask for any piece of information they choose, as legally, they run the organisation.

However, for privacy reasons, the chair and the board as a whole should consider whether this is wise. For example, if a board member requests access to the private financial information of a selection of members, the board should ask why this is necessary. Ideally, data should be collected only for a specific reason and it should be shared only with those who need to have it for a particular reason.

Requesting information from the CEO should not be onerous. If the CEO doesn't have access to the information, perhaps because it hasn't been collected, this can stimulate a conversation about processes and procedures. If the chair cannot request information from the CEO without a drama ensuing, then relations with the CEO need to be addressed.

The right to request information and expect to receive it relates to the board as a whole, not to any individual member. If a board member wanders into the office and picks up a piece of paper, or emails an administrative staff member requesting information without notifying or asking the CEO first, the staff are within their rights to refuse to provide the information.

Relationships between the board and the CEO can be badly damaged if the board attempts to go around the CEO to get information from the staff under them. This also puts staff in an awkward position. The board can technically do it but it is bad practice.

There are exceptions, critically in the area of investigations – for example, in cases relating to whistleblowing or accusations of sexual harassment or discrimination.

9. What happens if the CEO is right and the board is wrong?

Sometimes the board is right, and the CEO is wrong; sometimes the board is wrong, and the CEO is right; in either case, the board wins. The only actual power that the CEO possesses is that they can threaten to resign and put the organisation to considerable inconvenience.

However, the way a CEO and board operates in practice is often more nuanced. While we might expect the board to maintain a clear distinction between day-to-day operations and management, focusing solely on its role in strategy and governance, it often breaches this separation wall, and so does the CEO. The CEO has significant capacity to steer the board towards strategic decisions. The CEO knows much more than the average board member about how the organisation works, what things cost, and what has been tried before and failed, and the board should generally bow to their superior expertise.

10. Can the board terminate the CEO's contract if the CEO doesn't do whatever the board wants them to?

Many of the rules that govern boards can be found in the Associations Act. However, when boards employ staff or work with children or vulnerable people, for example, other legislation also applies. In the case of terminating a contract of employment, industrial relations law has an impact on the choices that boards can make without facing legal repercussions.

The constitution is silent on this question because the contract that the organisation has with the CEO (the contract of employment) has no relation at all to the contract that the organisation has with its members (the constitution). The precise terms of a CEO's contract are extremely relevant to the board's ability to make termination-related decisions, as are the laws regarding unfair dismissal.

In summary, the board can remove a CEO, however it's not easy, quick, or cheap.

