Chartered Governance Institute of Southern Africa

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CGISA Best Practice Guide

BOARD COMMITTEES AND THE ROLE OF THE COMPANY SECRETARY

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1 INTRODUCTION

The relationship between board committees and the board, and the company secretary's role in this regard, can be likened to the human central nervous system. We can view the board as the brain, ultimately responsible for the decisions taken by the company and providing oversight of the performance of the company. The various board committees can be seen as the sensory system, feeding information to the board continuously to enable the board to make informed decisions. The company secretary can be likened to the spinal cord, supporting the board committees and the board by advising and guiding, and in doing so, creating a pathway of information between the board and the board committees, which enables correct and informed decisions. Without the adequate functioning of any of these components, the company will in essence become a lifeless organism, and will cease to exist.

There are various board committees, each with their own mandate and specialised field of operation. Careful consideration needs to be given to the appointment of committee members to ensure that the committees are diverse and are made up of the requisite skills and knowledge. The terms of reference of each committee should include clear provisions detailing among others, the composition, authority and responsibilities of the respective committee. In simple terms, the board delegates functions to the various committees, which operate under their approved terms of reference. Of significant importance is the reporting function of these committees to the board, as the board relies on the skill set and knowledge present on these committees to assist in the overall functioning and decision-making processes.

The role of the company secretary on the various board committees is advisory and administrative in nature. Administrative functions include drafting the terms of reference, agendas, circulating the meeting packs and taking minutes of the meetings. The advisory function is multifaceted and extends across all board committees. The chairperson and members of the board committees rely on the company secretary to highlight any new and applicable legislative provisions, and to point out when decisions being taken are not indicative of good governance principles, or are illegal and/or unethical.

This guide will look at the various board committees, their composition and function. A brief view of legislative requirements and governance recommendations in respect of board committees will be highlighted. The role of the company secretary on board committees will be discussed, and practical examples will be used where relevant.

2 LEGISLATIVE OVERVIEW

2.1 The Companies Act

Section 72 of the Companies Act 71 of 2008, as amended ("the Act") discusses board committees in general. This section provides that the board of a company may, except where otherwise stated in the memorandum of incorporation ("MoI"), appoint any number of committees and delegate to those committees accordingly. The Act requires certain companies to establish audit committees and social and ethics committees.

In respect of audit committees, the Act states that at each annual general meeting, all public companies, state-owned companies, and companies required to do so in the MoI, must establish an audit committee, comprising at least three members.[1] The Act further provides that each member of the audit committee must be a director of the company.[2]

Regulation 43 of the Act deals with the social and ethics committee, and provides that all listed public companies, state-owned companies and companies with a certain public interest score, are mandated to establish a social and ethics committee. A company is not required to have a social and ethics committee if it is a subsidiary of another company that has such a committee which fulfils the functions for the subsidiary company. Companies can apply to the Companies Tribunal for exemption if they have other mechanisms in place that perform the function of the committee, or if they believe it is "not reasonably necessary in public interest" for them to have such a committee. Regulation 43(4) specifies that the committee should comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business, and must not have been so involved within the previous three financial years.

2.2 The JSE listings requirements

The JSE listings requirements ("listings requirements") stipulate that all listed companies must have an audit committee. The composition of the audit committee must comply with the requirements of the Act and should be considered in accordance with King IV™ on an "apply and explain" basis, provided that the audit committee must comprise at least three members.[3]

Similarly, the listings requirements provide that all listed companies must appoint a social and ethics committee, and the composition of the social and ethics committee must comply with the requirements of the Act and should be considered in accordance with King IV™ on an "apply and explain" basis, provided that the social and ethics committee must comprise at least three members.[4]

All listed companies must also appoint a remuneration committee under the listings requirements. The remuneration committee must consist mainly of non-executive directors, and makes recommendations to the board relating to executive directors' remuneration.[5] Separate non-binding advisory shareholder votes must be cast annually on the remuneration policy and implementation report of the company. The remuneration policy must disclose the measures that the relevant company will commit to if either, or both, of these documents are voted against by 25% or more of the relevant voting rights. In listed companies where this is mandatory, the company secretary is often charged with managing and coordinating this process. Listed companies are required to table the non-binding advisory shareholder votes on remuneration at their annual general meetings. The JSE also requires listed companies to engage with dissenting shareholders, and the manner and timing of such engagement must be disclosed. Though the manner of engagement is not defined in the JSE listings requirements, the company secretary will often be the central point of engagement between the shareholders and the company on this issue.

The JSE listings requirements have made the principles contained in the King IV™ report mandatory for listed entities by including King IV™'s provisions in the listing conditions, and thus committees recommended by King IV™ would need to be established by listed companies.

1 *Section 94(2) of the Companies Act, 71 of 2008.*
2 *Section 94(4)(a) of the Companies Act, 71 of 2008.*
3 *https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/C7C92B6A-029D-4F04-8750-94491A6387DC/PSG_Capital_-_A_Directors_Guide_3rd_Edition.pdf*
4 *https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/C7C92B6A-029D-4F04-8750-94491A6387DC/PSG_Capital_-_A_Directors_Guide_3rd_Edition.pdf*
5 *https://www.bowmanslaw.com/article-documents/Corporate%20Governance_Sylvia%20Lekhutlile.pdf*

3 KING IV™

In general, King IV™ recommends that board committees comprise of directors, and that the majority of members should be independent non-executive directors, save for the risk committee. Other than the executive committee (usually chaired by "CEO"), all committees should be chaired by an independent non-executive director.[6] King IV™ recommendations promote effective collaboration among committees with minimal overlap of duties, as well as a balanced distribution of power.[7]

King IV™ recommends having a committee responsible for nominations of members of the board; risk governance; and remuneration.[8] King IV™ also refers to an audit committee and a social and ethics committee. In respect of audit committees, King IV™ recommends that all companies that have financial statements audited should establish an audit committee, even if not required by statute.[9] Where the governance of risk is not delegated to the audit committee, King IV™ highlights that the audit committee should still oversee the management of all risks that affect the integrity of external reports published by the company.[10]

King IV™ encourages companies not legally required to establish a social and ethics committee, to nevertheless consider creating a structure that would achieve similar objectives.[11] Principle 8 of King IV™ recommends that delegation to committees should be recorded by way of terms of reference that should be approved and reviewed annually by the board.[12]

[6] *https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/C7C92B6A-029D-4F04-8750-94491A6387DC/PSG_Capital_-_A_Directors_Guide_3rd_Edition.pdf*
[7] *https://www.pwc.co.za/en/assets/pdf/king-iv-steering-point.pdf*
[8] *https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/562ED5CF-02E8-4957-97C8 D3F0C66A7245/King_IV_Practice_Note_on_Governing_Body_Committees.pdf*
[9] *Recommendation 51 of Principle 8 of the King IV™ report.*
[10] *Recommendation 54 of principle 8 of the King IV™ report.*
[11] *https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/C7C92B6A-029D-4F04-8750-94491A6387DC/PSG_Capital_-_A_Directors_Guide_3rd_Edition.pdf*
[12] *Recommendation 42 of principle 8 of the King IV™ report.*

4 OVERVIEW OF BOARD COMMITTEES: COMPOSITION AND FUNCTION

The company secretary needs to ensure that he or she has a thorough knowledge of the required composition and functioning of the various board committees. This forms part of fulfilling the advisory role in regard to the legal and governance practices that should be in place within the company. King IV™ speaks to the company secretary needing to have the necessary competence, gravitas and objectivity to provide independent guidance and support. The company secretary, as part of their mandate, must accordingly have the necessary knowledge and skills to ensure the adequate functioning of the relevant committees. Where the board committees are not functioning in accordance with their prescribed mandate, or where the board committees do not comprise the requisite skill, knowledge and independence, the company secretary may then be subject to scrutiny. For purposes of this guide, we will focus on the audit committee, social and ethics committee, remuneration committee, nomination committee and the risk committee.

4.1 Audit committee

Composition

The Act provides that the audit committee must comprise at least three members, appointed by the shareholders at each AGM, and each of these members must also be directors of the company. The Act goes on to state that members of the audit committee may not be involved in the day-to-day management of the company; may not be a prescribed officer or employee of the company; may not be a material supplier or customer of the company, and may not be related to any of these persons. There isn't a good understanding and awareness of these exclusions i.e. explicitly excluding Executive Directors as well as certain Non-Executive Directors. Executive directors may attend by invitation to provide insight where necessary.[13] The need for audit committee independence cannot be overstated.

In the public sector, the Public Finance Management Act, 1 of 1999 ("PFMA") provides that the audit committee must consist of at least three persons, of which one must be outside of the public service. Also provided is that the majority of members of the committee may not be employees of the company, except with consent of the relevant Treasury, and that the chairperson may not be an employee of the company.[14]

King IV™ recommends that the committee should comprise at least three members, all of whom should be independent non-executive directors. All members of the audit committee shall have the necessary financial literacy, skills and experience to execute their duties effectively. The chairperson of the board should not be a member of the audit committee.[15]

Function

The overall function of the audit committee is to assist the board with financial reporting and long-term sustainability. The members of the committee must have knowledge and experience in financial reporting, external auditing, internal audit and the sector in which the company operates. The Act lists a number of functions of the committee in section 94. These include the following:

- Nominate a registered auditor, who in the opinion of the audit committee is independent of the company, for appointment as auditor.
- Determine the fees to be paid to the auditor and the auditor's terms of engagement.
- Ensure that the appointment of the auditor complies with the provisions of the Companies Act and any other legislation applicable to the appointment of auditors.
- Determine the nature and extent of non-audit services that the auditor may provide to the company.
- Pre-approve any proposed agreement with the auditor for the provision of non-audit services.
- Prepare a report to be included in the annual financial statements for that financial year –
- describing how the audit committee carried out its functions;
  - stating whether the audit committee is satisfied that the auditor was independent of the company; and
  - commenting in any way that the committee considers appropriate on the financial statements, the accounting practices and the internal financial controls of the company.
- Receive and deal appropriately with any concerns, complaints, whether from inside or outside the company, or on its own initiative, relating to –
  - the accounting practices and internal audit of the company;
  - the content for auditing of the company's financial statements;
  - the internal financial controls of the company; or
  - any related matter.
- Make submissions to the board on any matter concerning the company's accounting policies, financial control, records and reporting.
- Perform such other oversight functions as may be determined by the board.

[13] *Section 94 of the Companies Act, 2008.*
[14] *Section 77 of the Public Finance Management Act, 1999.*
[15] *Principle 8 of the King IV™ report.*

4. OVERVIEW OF BOARD COMMITTEES: COMPOSITION AND FUNCTION *(continued)*

How fraud at some of South Africa's biggest companies flew under the radar (extract, July 2019)

Lewenson explains that there are three important role players when it comes to assuring the audited financial statements: the audit committee, an internal audit function and the external auditor/s.

"All three of these functions should work together to ensure good governance of audit practices. As soon as there is a weak link in the chain, it invites opportunity for financial mismanagement. As we have seen with the recent examples of Steinhoff and Tongaat, the implications are massive," he said.

"Looking more closely at the three functions, the audit committee is a sub-committee of the company's board.

"This committee will elevate their issues or concerns to the board, but their primary task is to guard the auditing practices of the company and finalise a company's financial statements which the Head of the Audit Committee assuming the responsibility for signing off the financial statements.

"The internal audit function acts as another line of defence and ought to report directly to the audit committee on material internal audit findings. The external auditor then has to take a view on whether the financial information of a specific financial year is correct and unqualified," Lewenson said.

However, the question remains; did the Tongaat internal audit function and its audit committee do enough when the discrepancies first emerged?

"Steinhoff in comparison, had an audit committee comprising of incredibly seasoned and experienced individuals who maintain that all the fraudulent activity that came to the fore, emerged out of the blue and they knew of nothing," said Lewenson.

"The implicated transactions orchestrated by Jooste and certain executives went on for almost 10 years.

"Can we assume they managed to hoodwink experienced and well-respected members of the combined audit function throughout that time? Given the calibre of the audit committee members, it is extremely hard to comprehend how this happened.

"It begs the question of whether the board applied their minds appropriately when they saw the financial results, or did they just blindly accept that the information was correct. This highlights the critical role that a board plays in interrogating financial statements and the correct use of the internal audit function."

He said that both companies had entrenched and long-serving board members and CEOs, which could be viewed as having impacted the independence of the board.

Source: https://businesstech.co.za/news/business/331341/how-fraud-at-some-of-south-africas-biggest-companies-flew-under-the-radar/

4. OVERVIEW OF BOARD COMMITTEES: COMPOSITION AND FUNCTION *(continued)*

King IV™ recommends certain other functions of the audit committee under principle 8. The committee should oversee integrated reporting, and should ensure that a combined assurance model is applied. The committee should form an integral part of the risk management process adopted by the company, and should consider information technology as it relates to financial reporting. Risk management also relates to the going concern of the company. In addition, the committee should embrace the use of technology to improve audit processes and efficiency. Reporting to the board and the shareholders of the company on the progress made in fulfilling its various functions, should be done by the committee.

Audit committee chairs talk to the PCAOB about Covid-19 challenges (extract, August 2020)

Most of the audit committee chairs reported that the pandemic led to more frequent communication with their auditors, and the chairs were generally satisfied with the extent of these communications. One of the most common discussions related to how to best complete audit work a timely basis. Some chairs also highlighted their expectations of continued frequent communications as new risks and uncertainties emerged as a result of the pandemic.

Audit chairs found the following communication topics to be particularly useful:

- "Discussions about trends auditors are seeing across their client base, particularly those pertaining to industry peers;
- Presentations on areas of the audit that may or will warrant increased attention due to the effects of Covid-19, as well as how the auditor plans to approach those areas; and
- Audit firm resources and webinars with industry-specific content."

Two other topics that came up frequently were enterprise risk management and company culture. With regard to ERM, audit committee chairs said that they were devoting more time to this issue, with some indicating that their ERM plans were effective with just a few tweaks and others needing to essentially start over because the plans did not contemplate such an enduring crisis. Related to ERM is an enhanced focus on corporate culture, both with regard to supporting management through the stressful environment and the need for increased attention to issues of culture such as the potential for fraud.

Source: https://www.lexology.com/library/detail.aspx?g=0b954de8-6807-43e3-a1d2-09518d9af10d

4.2 Social and ethics committee

Composition

The Act states that the committee must compromise a minimum of three directors or prescribed officers of the company, at least one of whom must be a non-executive director and must have been non-executive in the previous three financial years. The members of the committee are appointed by the board.[16]

King IV™ recommends that, subject to statutory provisions, the committee should comprise executive and non-executive members, with a majority being non-executive members of the board.

Function

The social and ethics committee fulfils a vital role in promoting good governance practices within the company. The committee has an independent role with accountability to both the board and shareholders. The committee does not assume the functions of management, which remain the responsibility of the Executive Directors, prescribed officers and other members of senior management.[17] Regulation 43 of the Act is very specific in regard to the functions of the committee. The functions are divided into five categories, namely:

1. social and economic development;
2. good corporate citizenship;
3. environmental, health and safety concerns;
4. consumer relations; and
5. labour and employment.

[16] *Regulation 43 of the Companies Act, 2008.*
[17] *https://www.tei.org.za/index.php/resources/articles/business-ethics/2239-social-and-ethics-committee*

Although ethics is not included in Regulation 43, it should nevertheless be included in the role of the committee. This committee would also be responsible for ensuring that fair remuneration practices are adopted within the company. Under environmental functions, the important issue of climate change, which all companies should be focusing on, should be addressed by this committee and included in the integrated report.

The committee must draw matters within its mandate to the attention of the board as the occasion requires, and must report through one of its members to the shareholders at the AGM regarding matters falling within its mandate.

The JSE listings requirements, in LR7.F.5A, provides for the social mandate and requires that a statement must be made by the social and ethics committee of the applicant issuer that it has fulfilled its mandate as prescribed by the Companies Regulations to the Act and that there are no instances of material non-compliance to disclose. If instances of material non-compliance exist, these items must be disclosed.

King IV™ confirms that the duties of the committee are those prescribed by statute, and any other duties delegated to the committee by the board. In addition, the proposed amendments to the Companies Act require that in respect of the social and ethics committee, the reappointment of the committee at each AGM by a public company or a state-owned company and the requirement for external assurance.

4.3 Remuneration committee

Composition

The Act does not specify any requirements pertaining to the composition of this committee. King IV™ recommends that all members should be non-executive directors, with the majority being independent. The chairperson of the board must not chair the committee, but may be a member of it. The CEO should not be a member of the committee (he/she should attend by invitation but recuse him/herself when conflicts of interest arise).[18]

Function

The committee is predominantly established to provide assistance to the board on setting and implementing remuneration policies. The Act does not stipulate specific functions of the committee.

The Act does state, in section 66, that non-executive directors' fees require approval by a special resolution of the shareholders within the previous two years. Shareholders are not, in terms of the Act, afforded a similar vote in respect of executives' remuneration.[19] The recent draft amendments to the Act, proposes affording shareholders scrutiny over executives' remuneration, by requiring directors of a public company to present their remuneration report for submission to the shareholders annually.[20]

Remuneration needs to be fair, transparent and responsible, and should be disclosed in three distinct sections:[21]

1. a background statement;
2. an overview of the main provisions of the remuneration policy; and
3. an implementation report, which contains details of the remuneration awarded.

Listed companies are required to table the non-binding advisory shareholder votes on remuneration at their AGMs. Where more than 25% of shareholders vote against the remuneration policy of the company, the JSE requires listed companies to engage with dissenting shareholders, and the manner and timing of such engagement must be disclosed.[22] King IV™ recommends that where 25% or more shareholders vote against the remuneration policy, the following should be included in the background statement of the remuneration report:[23]

- with whom the company engaged, and the manner and form of engagement (e.g. meeting of shareholders), and
- the nature of steps taken to address the legitimate and reasonable concerns.

The committee is often responsible for reviewing contracts of employments and for making offers in that regard. Furthermore, the committee reviews the remuneration of the group executives and the company secretary on an annual basis.

[18] Principle 8 and 10 of the King IV™ report.
[19] https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Corporate/corporate-and-commercial-alert-6-february-a-stronger-say-on-pay-for-south-africa-.html
[20] https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Corporate/corporate-and-commercial-alert-6-february-a-stronger-say-on-pay-for-south-africa-.html
[21] Principle 14 of the King IV™ report.
[22] LR3.84(k).
[23] Principle 14 of the King IV™ report.

4. OVERVIEW OF BOARD COMMITTEES: COMPOSITION AND FUNCTION *(continued)*

How to maintain good corporate governance during uncertain times (extract, April 2020)

The Covid-19 pandemic and emergency measures taken by the South African Government have caused unprecedented business disruption. They have forced companies to respond to new and ever-changing risks and challenges, from employees' health and safety to site closures, supply chain disruptions and decreased demand for many goods and services.

In this crisis, it will be critical for boards to take into account the views of and consequences for key stakeholders in setting policies and making decisions. This stakeholder-inclusive approach is also recommended by the King IV™ Report on Corporate Governance and is implicit in the preamble to the Companies Act. Having regard to and, in these circumstances, balancing the interests of all stakeholders in making decisions may well be perceived as acting in the best interests of the company.

Boards and remuneration committees will be held to account by the public for decisions made now that do not reflect personal and meaningful support for the workforce. These issues will be accentuated and subject to greater scrutiny for companies that receive state aid. Regular communications and discussions with these stakeholders about emergency policies and actions will be critical. Typically, for example, updates to shareholders take place at specified times, but in this setting, frequent updates outside the formal cycle may be welcomed and generate a supportive approach.

Source: https://www.bizcommunity.com/Article/196/547/202846.html

4.4 Nominations committee

Composition

The Act does not specify any requirements pertaining to the composition of this committee. King IV™ recommends that all members should be non-executive directors and the majority should be independent.[24] The committee should be chaired by an independent non-executive director. The chairman of the board should be a member of the nominations committee, and may also be its chair. The CEO should not be a member of the nominations committee and should attend by invitation.[25]

Function

The overall function and role of the nominations committee is to ensure that the board comprises the necessary skill, knowledge and expertise to ensure the long-term sustainability of the company. The nominations committee needs to also ensure that all nominated persons are ethically sound, independent and are committed to upholding good governance practices.

King IV™ recommends the following focus oversight areas for this committee: The process for nominating, electing and appointing members of the governing body; succession planning in respect of governing body members; and evaluation of the performance of the governing body.[26] Nominations committees are often responsible for overseeing the process of on-boarding new directors and guiding their continuing development.[27] In addition, the committee should oversee the development and implementation of continuous professional development ("CPD") programmes for the board, which may include regular training on legislative amendments and corporate governance topics.[28]

In terms of the JSE listings requirements, the following policies need to be in place and applied in the appointment of directors to the board:

- a policy on the promotion of gender diversity at board level and report to shareholders in its annual report regarding its application; and
- the board of a company must have a policy on the promotion of race diversity at board level and report to shareholders in its annual report regarding its application.[29]

[24] *Principle 8 of the King IV™ report.*
[25] *Principle 8 of the King IV™ report.*
[26] *Principle 8 of the King IV™ report.*
[27] *https://www.iol.co.za/business-report/opinion/boardroom-brief-nominations-committees-play-a-crucial-role-34397786*
[28] *https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/49D62EF3-F749-403C-BE47-73C50F27F30F/General_Guidance_for_Boards_-_Nominations_Comm.pdf*
[29] *LR 3.84.*

4. OVERVIEW OF BOARD COMMITTEES: COMPOSITION AND FUNCTION *(continued)*

4.5 Risk committee

Composition

The Act does not specify any requirements pertaining to the composition of this committee. King IV™ recommends that members should be executive and non-executive directors with a majority being non-executive directors.[30] The CEO should not be a member, but should attend by invitation, if necessary. The committee should comprise a minimum of three members.[31]

Function

Some companies combine the audit and risk committees. The risk committee plays a vital role in the management and mitigation of identified risks. The committee needs to ensure that risks are up-to-date and needs to continuously assess whether new risks pose any threat to the sustainability of the company, or to the company's ability to continue as a going concern. Looking at the Covid-19 pandemic, the committee in most companies would need to have placed Covid-19 and its possible effects on the company at the top of its agenda. Covid-19 would certainly impact many facets of the company's operations including the fulfilment of contractual obligations, health and safety, technology and engagement with stakeholders. This committee would ordinarily play a significant role in identifying material matters, and in managing the needs of stakeholders.

The overall function of the committee may include the following:[32]

- oversee the risk management infrastructure;
- address risk and strategy simultaneously, including consideration of risk appetite;
- monitor risks;
- oversee risk threats;
- advise the board on risk strategy; and
- approve management risk committee charters.

Building Strong Risk Committee Relationships (extract, October 2020)

There are plenty of ways that risk managers can get the notice of the risk committee and the board, but to avoid having the relationship be one-sided, experts stress that risk professionals should not be making all the moves - executives also need to open up more and be prepared to give more, especially around strategy.

"If executives want the risk function to think more strategically, they need to tell them what the strategy is in full," Forsyth said. "Risk functions can't add any real value unless they know the full picture, so the board and the risk committee need to share information too, and do so regularly."

Risk committees also need to be more willing to challenge risk management to get the best out of the function. "Risk committees rarely question whether the risk plan that has been agreed upon is actually the right one for the business – even if the risk landscape or circumstances impacting the business have changed," she said.

Risk committees too often see their role as reviewing and overseeing a process that has already been agreed with management, and which therefore must presumably be the right one to satisfy the needs of the business, Forsyth said. It is very rare that the underlying premise of the risk plan is questioned. Risk committees often assume that all the work laid out in the plan can be done appropriately and on budget.

Increasing scrutiny of the board and risk committee should incentivize working more closely with risk professionals.

Source: http://www.rmmagazine.com/2020/10/01/building-strong-risk-committee-relationships/

[30] *Principle 8 of the King IV™ report.*
[31] *Principle 8 of the King IV™ report.*
[32] *https://erm.ncsu.edu/library/article/deloittes-guide-on-risk-committees*

5 BOARD OVERREACH

Board overreach occurs when members of the board become involved in the operations of the company as opposed to fulfilling their oversight function. Where the board loses sight of its governance role, and crosses over to becoming involved in the management of duties and functions, board overreach occurs, which may have damaging consequences.

5.1 The private sector

The board may become burdened with operational issues and lose its strategic focus. From a company secretarial perspective, this becomes difficult to manage from a time management and agenda-setting point of view. The company secretary needs to firmly focus the attention of the chair in order to ensure that more emphasis is placed on matters, which fall within the board's mandate and require strategic input.

From the perspective of a listed entity, King IV™ requires that the board must effectively delegate. This is in keeping with maintaining the balance of powers, promoting independent judgement and ensuring the effective discharge of duties. There are a host of negative consequences, which could result from a failure to adequately fulfil this responsibility. Some potential issues which come to mind that may require intervention of the company secretary include the following:

- ensuring that board meetings reflect the views of the collective – there is an increased likelihood for dominant decision-making, which feeds in to group think; and
- entrenched hierarchy and bureaucracy, which limits management's motivation and ability to fulfil their functions by means of usurping their authority through micromanagement.

There are also potentially detrimental liability consequences for boards, as their insurance cover is only in respect of matters within their mandate. The company secretary is generally the contact regarding such cover and should accordingly keep the board appraised of when they are straying from their mandate. The company secretary must therefore ensure that the board is clear on its mandate and that its role is governance-focused and not operational.

Board overreach is likely a symptom of a board not having the ability to effectively delegate its authority and one would have to consider the root cause for such a situation. Where, for example, the board needs to step in to assist with operational matters that are the responsibility of key executives, one would have to question the capability and capacity of such individuals, or in their absence, whether effective succession planning has been properly considered.

Further examples of when board overreach could occur in the private sector include the following scenarios:

- Where a board member is new and inexperienced – particularly relevant for recently retired CEOs and executive directors who now have just been made a non-executive – they take a few months to settle in.
- Where a board member who likes showing off/is arrogant/is a bully and can't help themselves in telling management how to do their jobs. This is a personality issue and not much can be done unless the board member is asked to step down or the chairperson gives the board member a talking to. There are various personalities that may be present on the board, including the charismatic types that develop a cult-like following, as could be evident in the Steinhoff saga. Some other personality types that have been identified in the boardroom include the following:[33]
  (a) The shrinking violet – directors who are shy or lack confidence;
  (b) The sniper – directors who influence others on the board to share their opinions, or who like to overshadow the opinions of others;
  (c) The historian – directors who are stuck in the old ways of doing things;
  (d) The expert – directors who add value with their in-depth knowledge in various areas;
  (e) The eager beaver – directors who always volunteer, and may take on too much;
  (f) The hippo – directors who scarcely volunteer to assist;
  (g) The whiner – directors who like to complain and focus on all the negatives.
- Where management is weak and board members think they need to step in – instead they should be replacing weak management with competent hires.
- oard members genuinely do not know that they have an oversight role only – they have not had a proper briefing/induction/education.
- A polite CEO who has allowed operational direction to creep in might have been respectful once while taking direction from his or her board that bordered on operational instruction but then it starts to become a habit. Unfortunately when that door opens sometimes it becomes very hard to close it again.

One of the most effective ways that the company secretary can prevent board overreach is to ensure that all new directors are inducted and trained efficiently, and are aware of their roles as members of the board.

[33] *https://www.leadinggovernance.com/blog/better-board-meetings---challenging-behaviour-boardroom*

5.2 The public sector

Board overreach in the public sector can be evidenced in the following respects, to name a few. Not all board members understand that there is the fundamental principle of working "in the best interests of the organisation" – and often perceive that they represent the shareholder's interest solely and try to impose that view. This can get sticky when, as in the case of many public sector entities, there is only one shareholder, which is the State represented by the respective Minister.

Sometimes the Minister forces his or her agenda onto the entity through the board. Some members claim powers due to their proximity to the Minister who appoints them and end up making operational decisions, such as the award of contracts to their family for a personal benefit. These practices are often also carried out by top management.

Another scenario is where the board seeks legal advice on various matters and then does not share this advice with management because they claim that it was obtained for use by the board. This can lead to the impression that the board requires constant updates on the decisions they make without trusting management to implement such decisions.

Sometimes the board plays members of management against each other – which can create great discomfort, especially if some of the members of management have also been appointed by the Minister.

The above scenarios may conversely happen against the board – where management has the upper hand for whatever reason, and then the board ends up being compromised in its function.

Normally the company secretary reports functionally to the chairperson of the board but administratively to the CEO, and so has to work this careful balancing act in difficult situations caused by the above scenarios. In trying to navigate these difficult situations that may arise, the company secretary must:

- not take sides but always remember that he or she must also function in the best interests of the organisation;
- keep all correspondence in writing;
- work with the full board or board committees and not with individual board members who may have their own agenda; and
- take every opportunity to remind the board frequently about governance, legislation and principles; their charters; the board code of conduct etc.

6 EFFECTIVE REPORTING

Perhaps one of the most important functions of board committees is the manner in which board reporting is done. Without transparent and meaningful reporting, the board will not have adequate knowledge of the actions taken by the board committees, and this will impact the board's role in regard to oversight and good governance as a whole. The timing and scheduling of committee meetings is also key so as to ensure sufficient time to prepare and submit reports to the board. Decision-making at board level is informed by the information the board receives through reporting, which should facilitate robust debate, relevant questions and proper action plans, aimed at ensuring sustainability of the company in the short, medium and long-term.

Reports to the board need to consist of information that is reliable, relevant and meaningful. The quality of the information as opposed to the quantity needs to take precedence. The flow of information must be prioritised in a manner, which ensures that topics requiring swift and immediate action are tabled first, followed by detail which is still perceived as important, from an awareness perspective, but less so from an action standpoint. A lack of important information being received and deliberated by the board can have devastating consequences.

Massive cyber security investments wasted due to governance fails (extract, August 2020)

Despite massive investments in cyber security tools, organisations are still being breached – typically due to inadequate cyber security governance and poor communication between IT and business.

This is according to Tichaona Zororo, director of Digital Transformation & Innovation Advisory at Enterprise Governance of IT ("EGIT").

Zororo, who until recently served as president of ICASA South Africa, points to the lack of proper cyber security reporting to the board as one of the major factors behind ongoing breaches taking place.

"While organisations have invested millions into cyber security, we have to ask if the board of directors and senior management really have a good line of sight over cyber security.

"In most cases they are not even getting any cyber security reports, and if they do, the reports are insufficient and don't deliver the proper business context to enable them to give the right direction".

Source: https://www.itweb.co.za/content/dgp45va6JW27X9l8

It is important that the reports to the board show that progress is being made in the execution of the relevant board committee's mandate. In this regard, the company secretary should constantly review whether the correct items are tabled on the agenda and discussed by the committees, and that the responsibilities echoed in the committees' terms of reference are being actioned throughout the year in a timely and effective manner. Similarly, the company secretary should ensure that the integrated annual report makes mention of all the actions taken by the committees in the respective financial year, and that disclosure in this regard is transparent and informative, and coincides with the information that the board has received through board reporting.

When reporting or presenting to boards, management must:[34]

- be clear as to the purpose of the report or presentation and what the board is being asked to do arising from it (that is, for noting information purposes only, for discussion and to gain the board's wisdom and input, or for decision-making and resolution);
- know their audience;
- be responsive to audience's needs;
- understand board politics and personalities;
- maintain focus on key issues; and
- be patient, polite and respectful.

The company secretary needs to ensure that a holistic view of the company's state of affairs is presented at the board meeting. This is achieved through setting an agenda, which captures relevant items; ensuring that board reports are comprehensive and informative and ensuring that any items requiring discussion are discussed in detail taking into account positives and any negatives or shortcomings.

[34] *https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/director-tools/2019/organisational/07236-3-9-relationship-between-the-board-and-management-fa.ashx*

7 PRACTICAL GUIDELINES FOR THE COMPANY SECRETARY

7.1 Drafting terms of reference

Principle 8 of the King IV™ report provides as follows:

The governing body should ensure that its arrangements for delegation within its own structures promote independent judgement, and assist with balance of power and the effective discharge of its duties.

Some committees are statutorily required – the terms of reference must include all the requirements and roles as stipulated in the governing legislation, some of which may be multiple. In the case of the public sector, it could be the PFMA, Treasury Regulations and even the Companies Act. King IV™ principles must be included as applicable. The delegation of authority to board committees is recorded in the committees' terms of reference, which are approved by the board. The terms of reference serve as a founding document in respect of the approved mandate of the respective committee, its composition, role, and responsibilities. The committees' terms of reference can be likened to the MoI of the company, in that the committee cannot act outside of the scope of the approved terms of reference.

Generally, the committees' terms of reference should include information in respect of the following:

- Purpose of the committee;
- Composition of the committee;
- Vacation of office of members of the committee;
- Role of the committee;
- Responsibilities of the committee;
- The manner in which the committee reports to the board;
- Authority / mandate of the committee;
- Frequency of meetings of the committee; and
- Quorum required in respect of committee meetings.

The terms of reference should also contain a clause to state the maximum term of office for committee members. This will ensure that committee member independence is preserved and that diversity of membership is encouraged. An example of such a clause is as follows:

The members of the Committee shall be appointed for a term of 3 (three) years but shall be eligible for reappointment, subject to a maximum of four terms.

CSA to engage in reputation management battle instead of transparency (extract, July 2020)

Cricket South Africa ("CSA") has been fending and ducking bouncers for more than a year, after a series of blunders left the organisation deep in the crease and on the back foot at the end of 2019.

A forensic audit into the organisation ordered by the Members Council was the next step. The terms of reference of that audit included the role the board played in the management issues that rocked CSA, which at the very least, did not provide oversight into Moroe's tenure.

It's been an effective tool because it has highlighted the perception that the CSA board is reluctant to reveal the findings of the forensic audit. Moroe, through his attorney has accused CSA of retrospectively changing the terms of reference of the audit to protect the board – claims which board chairman Nenzani has vehemently denied.

"We now know that the terms of reference of the investigation have been narrowed down to only focus on the wrongdoings of Mr Moroe," Bill told radio station SAFM last week. "They (the CSA board) have essentially said: 'Investigators, please don't look at us as a board, don't look at what we have done, but only focus your attention on Mr Moroe'. That is what is happening and what the resolution is saying in plain words.

Source: https://www.dailymaverick.co.za/article/2020-07-14-csa-to-engage-in-reputation-management-battle-instead-of-transparency/

Delegations to committees must be clearly listed either in the terms of reference or the charter of the committee or in a separate delegations document. Committee chairs must have a slot at every board meeting to provide an update to the board on the activities of the committee subsequent to the previous board meeting.

Some matters would be reserved for the board, and would not ordinarily be delegated to any of the board committees.

Company secretaries need to ensure that they are aware of all matters that would need to be considered or approved by the board. Without this sound knowledge, there is the risk that matters would not be approved in accordance with the necessary requirements, which could lead to administrative nightmares and reputational damage. It is wise to have the company secretariat team members take responsibility for at least two committees each, under the company secretary's oversight and supervision, if the size of the team is big enough.

7.2 Drafting the annual work plan

The annual work plan for each committee should be prepared by the company secretary before the beginning of each year and must be approved by the relevant committee. Members of the committee should understand that the work plan must be flexible so that ad hoc or unexpected matters can be included during the course of the year. If we look at the Covid-19 pandemic, the annual work plan for 2020 would not have included this significant occurrence, and all affected committees would have had to adjust their agendas for 2020 to make provision for robust debate and planning around Covid-19 and its impact on various facets of the company's operations.

The annual work plan contributes to the effectiveness of board committees, and may also serve as a useful tool when reporting on all actions taken by the committees, during the course of the year, in the integrated annual report. By having an annual work plan, all members of the committee have a general understanding of what would be required of them during the course of the year, the topics that would require adequate attention, and may also serve as an alert to committee members to upskill their knowledge in certain fields that are going to be addressed in the year.

Apart from guiding committee members, the annual work plan assists the company secretary in setting the agenda for each committee meeting. When setting the agenda, the company secretary will look to the annual work plan to ensure that topics are timeously addressed, and that all expectations are met.

7.3 Drafting the agenda

In addition to the minutes, the agenda provides a useful record of the matters that came before the committee during the course of the year. When setting the agenda, the company secretary will refer to the annual work plan, and will need to bring forward any other matters, which have arisen post the work plan approval. The agenda provides a structure for the minutes of the meeting, which are drafted at a later stage.

The agenda provides a structure to the meeting, and the company secretary should assist the chairperson to follow the order of the agenda to ensure consistency and order. The meeting will provide for an item to approve the agenda, and there is the possibility that items will be added prior to the commencement of the actual discussions. The company secretary would need to note these additions when preparing the minutes.

Every agenda would contain the company name, date, time and location of the meeting, and would set out the members, persons in attendance and apologies received. The required quorum should also be recorded on the agenda to assist the company secretary at the meeting. With Covid-19, many agendas have now had to be amended to make the location of the meetings via online portals such as Zoom and Microsoft Teams. In this case, it would be useful to add the link of the meeting to the agenda for ease of reference for attendees. An example of how this is recorded is below:

ABC (Pty) Ltd
(Company registration number: 2020/00000/TBC)

Risk Committee ("the Committee")

Agenda for the meeting of the risk committee to be held via zoom (link: http://abcdefg.Com) on Tuesday, 3 November 2020 at 08h00.

Members	J White	JW
	G Pink	GP
	A Blue	AB
	S Green	SG
	P Yellow	PY
In attendance	S Purple – company secretary	SP
Apologies	T Orange	TO
Quorum	4 members personally present or by teleconference	

When setting the agenda, the company secretary should also request any suggestions to add to the items to discuss, from the committee members beforehand. This will contribute to preventing excessive changes to the agenda on the day, which could result in insufficient time being allocated to the various items. All efforts should be made to allocate the various items to different committee members to address in the meeting – this will ensure that all committee members prepare adequately. The company secretary needs to keep track of all meeting dates and ensure that the agenda and the pack are distributed to the committee members at least one week prior to the meeting.

The duration of the meeting should take into account a rough estimate of the level of debate on each item to ensure that important matters are not rushed through without proper consideration. Where the company secretary sees that too much discussion is taking place on a certain irrelevant matter, he or she needs to alert the chairperson to the time constraints and to the matters that still need adequate attention. It may be useful for the company secretary to add a section for time allocation under each agenda item:

Item No.	Topic	Responsibility	Time allotted for discussion
1	Covid-19	A Blue	15 minutes

7.4 Advisory role

The advisory role of the company secretary is a complex and challenging role, which requires knowledge; opinion and judgment. Confidence on the part of the company secretary is also required in this regard as the company secretary needs to speak up when committee members may be incorrect in their views, and cannot be fearful of backlash as a result. The board and the board committees rely heavily on the expertise of the company secretary to ensure that the company operates within the realms of the law, and is seen as a good corporate citizen thus ensuring its long-term success.

The knowledge required on the part of the company secretary is vast as various pieces of legislation and/or governance provisions apply to the different committees. In addition, the mandate of each committee differs, and without sound knowledge of what is required by each committee, the company secretary will fall short in his or her advisory role.

Steinhoff: Where was the company secretary? (extract, May 2018)

Once the role of the auditors and accountants have been fully laid bare the investigators are likely to discover more breaches related to other professionals such as company secretaries.

As the custodians of corporate governance and being intimately aware of Board discussions, and resolutions to authorise large scale cash movements, it can well be asked what is the company secretaries role in preventing unlawful transactions.

A company secretarial failing has recently cost a large corporate its listing on the JSE. Sagarmatha failed to ensure that their financial statements where filed at the CIPC resulting in the JSE refusing their listing. Thousands of shareholders and R4 billion is now in jeopardy.

One of the persons that is likely to be investigated is the company secretary. Transnet approved various transactions with Gupta linked companies whilst not following required policies and procedures. The company secretary should have been aware of these decisions as the custodian of corporate governance within Transnet.

Significantly they are required to state if the financial statements are compliant with the Companies Act and "ensuring that all contracts and agreements are kept in safe custody …and keeping monthly diary of significant issues required to be monitored in terms of such contracts and agreements."

Would Steinhoff, VBS, Gupta-gate, SARS rogue units and the other scandals have happened if the company secretary was truly committed to corporate governance?

Source: https://accountingacademy.co.za/news/read/steinhoff-where-was-the-company-secretary

As part of advising the various board committees, the company secretary should perform a skills gap analysis once per annum. In the public sector, the Board is normally appointed by the Minister. Should there be a skills gap in relation to the role of the committee, then the board can appoint advisors to the committee or external experts as members of the committee to bolster the capabilities of the committee. Board committees must always be chaired by non-executive directors and ideally, the majority of members must be non-executive directors.

A skills gap analysis may be conducted by means of an assessment of key skills and experience via a skills matrix. The skills gap analysis is intended to enable the Board to identify the skills profile of the Board and to determine, which skills are missing within the Board. It further assists in determining and making recommendation for committee memberships. The gap analysis is also a useful tool when a vacancy exists and is to be filled, as focus in filling a vacancy would be on the missing skills within the Board as determined by the gap analysis.

Directors and committee members would be required to self-assess against identified pertinent skills required for the effective functioning of the particular board or committee. This could form part of the board evaluation process and should be based on a rating scale, for example 1 being poor and 5 being excellent. In addition to self-assessment, this could form part of the board or committee's peer review process. The company secretary would then be responsible for collating the results and reporting the identified skills gaps to the board or committee, together with recommended measures to address such gaps, such as planned training and development as well as indicating required skills as part of the succession-planning process.

Appendix 1 has a template of a skills gap analysis conducted by the company secretary.

8 CONCLUSION

The harmonious functioning between the board and the board committees and the role of the company secretary in this regard is vital to the success of the company. The brain cannot function without the sensory system, and would be severely impaired should the spinal cord be damaged in that the spinal nerves would not be able to go up the spinal tracts to the brain. This would lead to the disruption of information channels. Similarly, where the board, the board committees and the company secretary are not performing adequately, the channels of vital information would be hindered, thereby affecting the decision-making processes of the company, and ultimately its long-term sustainability. The board committees provide overall support to the board, and as such need to discharge their mandates effectively and within their approved level of operation. The company secretary feeds this chain through knowledge and his or her advisory channel, and ensures that these committees function optimally through administrative oversight. Good governance is ultimately achieved through well-run board committees, and through the support function performed by the company secretary.

Belonging to a professional body, such as the CGISA, would help to keep the company secretary abreast of current developments and ensure that they are able to perform their functions properly.

APPENDIX 1

Chartered Governance Institute of Southern Africa

Board paper

To	Board of Directors
From	Company secretary's name
Date	27 August 2020
Subject	Board Composition

Background

The Company subscribes to the principles of good Corporate Governance as stipulated in the King Report on Governance for South Africa ("King IV™"). Principle 7 of King IV™ states the following with regard to the composition of the governing body ("the Board"):

"The governing body should comprise the appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively."

Recommended practice

A recommended practice of King IV™ is that before nominating a candidate for election to the governing body, the governing body should consider the following:

- The collective knowledge, skills and experience required by the governing body;
- The diversity of the governing body; and
- Whether the candidate meets the appropriate fit and proper criteria.

Annual review of the current and required skillset of the governing body

The Board Charter of the Company requires the review of the skillset of the Board in determining an appropriate criteria for nominations. The determined skillset below is in accordance with recommendations provided by the Board.

	Current Board member and sufficient nominated Board members
	Sufficient nominated Board members
	Insufficient nominated Board members

The current skillset of the directors/nominees are as outlined in the tabled below.

Skills	Qualifications	Seniority/scale of business	Name of director/nominee with these skills	Rag status
Strategic business skills	Degree or RPL	Senior executive or similar as a result of scale of business		
Technology/E-Commerce	Degree or RPL	Senior executive or similar as a result of scale of business		
Marketing/media PR/digital	Degree or RPL	Senior executive or similar as a result of scale of business		
Business development/ commercial	Degree or RPL	Senior executive or similar as a result of scale of business		

Skills	Qualifications	Seniority/scale of business	Name of director/nominee with these skills	Rag status
Audit and risk	Degree or RPL	Senior executive or similar as a result of scale of business		
Legal/corporate governance/social and ethics	Degree or RPL	Senior executive or similar as a result of scale of business		
Human capital/labour law	Degree or RPL	Senior executive or similar as a result of scale of business		
Corporate finance and deal structuring	Degree or RPL	Senior executive or similar as a result of scale of business		

Nominations received for the appointment to the Board

The following individuals have been nominated to the Board of Directors:

- TBC
- TBC

Process followed in terms of new nominations

The following procedures were performed for each provided nominee:

- Inspection of the Curriculum Vitae of each provided nominee to confirm that the said nominee has at least 10 years of experience in a Senior executive or similar role based on the scale of business.
- Inspection of CIPC documentation pertaining to each nominee to confirm whether the said nominee has previous Board experience.

Actions required of the Board

The Board is requested to consider the current skillset of the Board before nominating a candidate for election to the Board of Directors and any nominee who fits the skillset should be required to undergo a comprehensive fit and proper criteria test before being appointed to the Board of Directors.

A Brown

Company Secretary

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