

# **A Primer on Judgement and Responsibility**

*For directors and stewards of enterprises*

by Roger Stewart

**An orientation document**



# Orientation

This Primer is intended as an aid to orientation, not instruction.

It is written for directors and stewards who carry responsibility in situations where rules, models, and procedures are insufficient. Its purpose is to help readers frame what they are already accountable for — before deciding what to do, which tools to apply, or which advice to follow.

The Primer does not offer frameworks, checklists, or prescriptions. It does not seek to improve compliance, optimise decision-making, or substitute method for experience. Instead, it attends to judgement: how situations are understood, what is held to matter, and how responsibility is carried when consequences unfold over time.

The text is designed to be read reflectively and returned to as experience accumulates. Some sections may resonate immediately; others may only become meaningful after time, exposure, or difficulty. That is intentional.

If the Primer does its work, it will not provide answers.

It will clarify the questions you are already responsible for holding.

## ABOUT THE AUTHOR

Roger Stewart has worked for many years with boards, owners, and executive teams across a range of enterprises. His work focuses on judgement, responsibility, and value creation in conditions of uncertainty and long time horizons. He has held board and advisory roles in both private and public contexts, and writes on the limits of governance, decision-making, and formal systems when responsibility cannot be delegated. His interest lies less in prescribing action than in helping stewards recognise what they are already accountable for holding.

## COLOPHON

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# Executive Summary

## Primer for New Directors

### PURPOSE

This Primer equips newly appointed directors – whether in private companies or non-profit companies (NPCs) – with the essential knowledge and mindset to fulfill their responsibilities effectively. It bridges the gap between compliance and stewardship, preparing directors to navigate both legal obligations and the broader duty of care.

### KEY POINTS

- 1. Directors' fiduciary duty.** Directors are the legal and moral stewards of the company, bound to act in its best interests above all else.
- 2. The director's role.** Directors set strategic direction, oversee management, ensure accountability, and safeguard the company's long-term survival and success.
- 3. Legal and regulatory context.** A working knowledge of the Companies Act, the Memorandum of Incorporation (MoI), shareholders' agreements and governance codes (King IV and King V) is essential for effective service.
- 4. Compliance vs care.** Compliance is necessary but not sufficient; stewardship emphasises the long-term health, adaptability, and ethos of the organisation.
- 5. Practical orientation.** Early steps for new directors include reviewing the MoI, understanding key risks, the annual financial statements, clarifying board dynamics, and creating a 90-day plan.
- 6. NPC considerations.** While duties are broadly similar, NPC directors focus on mission integrity, public trust, and donor accountability.
- 7. Path to stewardship.** The follow-up booklet, *Stewardship in Practice: Beyond Compliance*, expands on integrating care into governance, ensuring prudent enterprise and enterprising prudence..

### INTENDED USE

- As pre-reading for director induction programmes
- Guidance to directors, members of close corporations, senior executives
- As a reference for early months on a board
- As a bridge to advanced learning on stewardship

### OUTCOME

Readers will understand their core responsibilities, recognise the balance between compliance and stewardship, and be prepared to serve as effective custodians of their organisations.

# Preface

One of the most critical aspects distinguishing directors from other advisors and individuals involved with a company is their fiduciary duty. While the Board of Directors (BoD) is mandated to manage the business and affairs of a company, directors are the sole custodians and stewards of the company, legally and morally bound to act in its best interests, to the exclusion of all other interests. This fundamental obligation underpins all their responsibilities and sets them apart. This fiduciary duty also applies to members of close corporations (see below), although their legal guidance comes from the Close Corporation Act and Common Law.

Despite this enormous responsibility, directors are appointed or may assume that position by way of an office they hold (e.g. by being a representative of a major shareholder or trustee of a major donor), as elaborated in the company's Memorandum of Incorporation or MoI (which is, simply put, the company's 'constitution'), which means that few directors have received formal training in directorship. This constitutes a material personal risk not only for the director but for the well-being of the company.

And yet there is very little to support new or established directors in their role. Maybe you're a candidate or newly appointed director, maybe you've been a director for some time but are still not sure what is expected of you and your colleagues on the board, or maybe you just want to understand the potential risks to which you might be exposed. Whatever the case, you'll have noticed the dearth of information offering any guidance.

This booklet has been developed to address this, to be a primer for directors to help them better understand that fiduciary duty is their defining responsibility, that compliance is essential but insufficient, and that stewardship adds care of the organisation, its assets and people, and foresight.

This booklet is also a primer for a prescribed officer. Few people who work in or with companies are aware that they are prescribed officers. The South African Companies Act 71 of 2008 (Regulation 3B) introduced the notion of a prescribed officer. This is a natural person (as opposed to a company) who is not an elected director, but who might be deemed to be one when it comes to expected standards of conduct and to potential personal liabilities.

You might not be aware that you are one, but you are a prescribed officer if you exercise or participate in general executive control and management over the whole, or a sizeable portion, of the business. This is a broad definition and there is no case law that specifically deals with the subject to provide greater clarification.

It will also be a guide to members of close corporations although their guide in law is mainly the Close Corporations Act and Common Law.

This booklet might also be of value to current directors who wish to better understand shareholder meetings (or member meetings in NPCs) and the role and authority of shareholders/members. It might also be of use to investors or donors so that they well understand the legitimate expectations of directors and the management of the company, its projects, income and assets. And it might, perhaps, also be useful for employees who wish to understand how their company is or should be governed. While labour law is well developed, the legal vacuum surrounding volunteers is a cause for concern for NPCs.

Finally, this booklet might be useful for people, or organisations, who are considering establishing a company rather than some other kind of legal structure for their business, for profit or non-profit company.

This primer also provides some introductory thoughts to the non-legal and non-financial aspects of the BoD's role in pursuing company success and a good reputation among the diverse group of people and organisations that have an interest in your company. There is no simple recipe, but there are some clues as to how one might go about achieving the status of a high-performance board and a company that is highly regarded by parties that have a material interest in it.

While this primer is primarily designed for directors of companies governed by the Companies Act, many of its principles apply equally to members of **close corporations** (CCs). CC members carry direct governance responsibilities – often without the formal scaffolding of a board – and are subject to fiduciary and financial duties codified in the Close Corporations Act. Although CCs operate under a different legal framework – their members are both owners and managers, making governance personal and direct – many of the stewardship principles outlined here, including fiduciary duty, care, and accountability, apply equally to CC members. Appendix A at the end of this booklet offers a tailored summary of CC governance and its alignment with stewardship practices.

This primer also acknowledges the significant and growing role of **non-profit companies** (NPCs). For this reason, a dedicated Appendix B explores issues exclusively relevant to NPC directors. An advantage of NPCs, particularly over voluntary associations (the most common NPO), is the explicit guidance provided by the Companies Act and its regulations regarding their incorporation and governance. The Appendix therefore includes some key extracts from the Act, its sections, schedules, and regulations directly relevant to NPCs, directors, and prescribed officers.

## UNDERSTANDING 'MEMBERS'

The word 'member' is used confusingly in corporate entity law and other writing (in my opinion). A member might refer to:

- The member of a CC – the incorporator and later equity holders with rights under the Close Corporations Act 69 of 1984.
- A shareholder of a profit company under the Companies Act and who is entitled to distributions from company profit.
- A member of a non-profit company, under the Companies Act, who is not a shareholder but is entitled to rights similar to a shareholder other than financial gain from profit/proceeds although they may be a 'third party' type bona fide supplier or contractor paid for defensible service.

### Key aspects of membership

- **Membership is based on entry in the register.** Persons become members of a company once their name is entered in the company's register of members.
- **Membership can transfer** to new owners of shares, provided their names are entered into the register.
- **Roles differ from directors.** While members (like shareholders) have a say in the company's direction, directors are responsible for the day-to-day management of the business and have their own specific duties to the company.

This information is included because the principle of good governance/stewardship applies to all who have the right to steward a company or CC – members, directors, and executives who are principal officers.

### Resources

- The entire Companies Act may be downloaded [here](#).
- The regulations pursuant to the Companies Act may be downloaded [here](#).
- The Companies Amendment Regulations can be downloaded [here](#).

# The ecosystem

What follows begins from this orientation and explores its implications for those entrusted with responsibility in enterprises.

How the board of a company arranges its business and responsibilities within the Act is its prerogative, unless the MoI or other applicable laws or regulations dictate otherwise. However, there is a general 'ecosystem' in which the board operates that will affect its business and responsibilities.

In 'systems language' the board is a holon (a whole) that is a part of its containing system, the company, which is a part of society which is a part of the natural, technical, and artefactual environment. One of the key responsibilities of the board is to navigate the company as part of and within these containing systems, ensuring a resonant relationship.

## LEGAL CONTEXT

Societies permit the establishment of companies by way of their legal system. For example, in South Africa it is the Companies Act 71 of 2008 (the Act). A company incorporated under the Act is a juristic entity that has legal personality, in other words, it can enjoy and is subject to legal rights and duties, as do natural persons.

A profit company (PC) is incorporated under the Act expressly for the financial gain of its members, known as shareholders. Yes, this is its legal purpose, but it also has a moral relationship with society: to maintain its 'licence to operate'.

A non-profit company (NPC) is incorporated under the Act for public benefit, or for cultural or social activities, or for communal or group activities; its incorporation is explicitly not for the financial benefit of its members (some NPCs do not have members), nor for its directors nor its officers (see Appendix 1.1). It has a moral relationship with society: to be economically responsible.

## DIRECTORS

Directors are members of the BoD, but they need not be shareholders of a PC or members of the NPC. As contemplated in Section 66 of the Act: 'The board must manage or direct the management of the business and affairs of the company, whether a PC or an NPC.' An alternate director is a director who serves, as the occasion requires, as a substitute for a particular elected or appointed director (not for any director).

The BoD has 'the authority to exercise all of the powers and perform any of the functions of the company', unless limited by provisions of the Act or the MoI. Only the BoD is charged and entrusted with this management responsibility and authority. It may be called to account for its management conduct and performance (see Appendix 1.2 for relevance to NPCs) even if day-to-day management is delegated to non-directors.

Directors are elected by a simple majority of the shareholders (PC) or members (NPC), unless the MoI imposes a higher level of support, and are appointed when they have consented to the appointment. There might also be *ex officio* directors. These *ex officio* directors are automatically on the BoD because of their status or position as elaborated in the company's MoI.

Filing the directors with CIPC (Companies and Intellectual Property Commission, the official South African government body responsible for registering companies, non-profit organisations, and cooperatives, as well as regulating intellectual property) is an administrative requirement but failure to notify CIPC does not invalidate the appointment.

## THE BOARD'S OBLIGATIONS, RESPONSIBILITIES, AND ACCOUNTABILITY

Society's expectation is that companies pursue success within its values and laws, and complying with the law is the core obligation expected of directors. It may be argued that compliance with society's values, which is not elaborated in law, is a moral obligation.

**Obligation** is an act or course of action to which a person is morally or legally bound. It compels an individual to follow or avoid a particular course of action, due to an agreement, contract or rules and regulations.

A **responsibility** is accepted by choice. It refers to something that is your job or duty to do or deal with, and for the performance of which you may be called to account to the person from whom you voluntarily accepted that responsibility. Consent to accept that responsibility is part of the legal process of director appointment.

Directors are also **accountable** to shareholders of the outcomes of their decisions and actions – they can be called to account, to 'please explain', in simple terms.

**In summary:** Obligation is a duty or commitment to perform an action, responsibility is the task or duty of performing that action, and accountability is the ownership of the results of that action. You have an obligation to do a task, the responsibility is the task itself, and you are accountable for the outcome. One can delegate responsibility to others (to manage, for example) but cannot delegate the accountability or obligations.

## MANAGEMENT

Managing is a craft that draws on numerous disciplines. The word derives from the Italian *maneggiare* which refers to the highly valued skill of handling and training horses, which eventually came to mean the skilful handling of tools and people, and eventually businesses and organisations.

The BoD is charged with the mandate to manage or direct the management of the company. This is usually accomplished by way of delegating day-to-day management to a chief executive, while retaining corporate-level management (of the company as a whole) for itself. The CEO is accountable to the BoD which, in turn, is accountable to the shareholder of a PC or members of an NPC. Somewhat paradoxically, shareholders and members of an NPC have no such legal accountability, although it might be argued they have a moral accountability to society which provides the licence of incorporation and to do business.

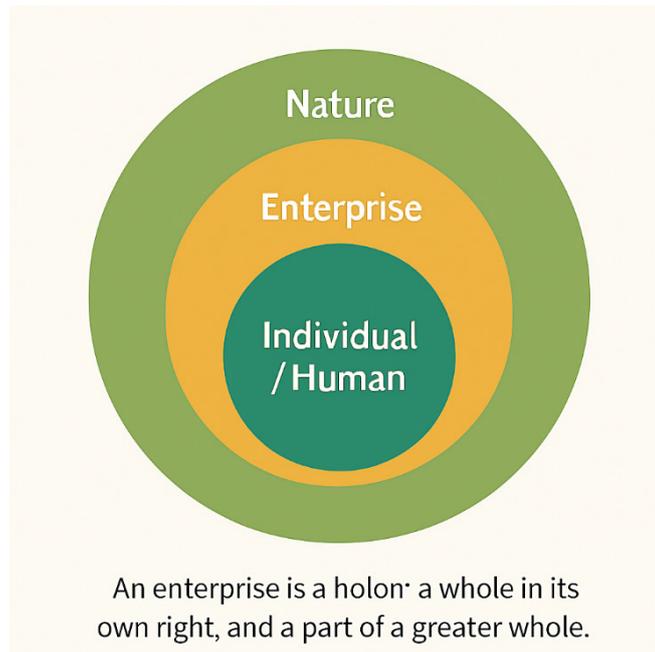
Good management allows organisations such as companies to achieve a vast array of goals through the joint work of managers and non-managers. The greatest challenge of management is to ensure that all parts of the company fit and function harmoniously (aesthetics) and work with a shared ethos (ethics and behaviours) towards the accomplishment of common goals, whether economic (PC) or social (NPC).

Aesthetics, ethics, and economics are all about value, and these converge and are unified in companies. Furthermore, management strives to ensure that the company endures in the long term, is valued in society for the way it operates, and has a positive impact intended by the incorporators or subsequent members of the company.

Directors are accountable to the shareholders (or members of an NPC) for the state of the company and its actions.

## SYSTEMS CONTEXT

A BoD and its company are social systems comprising interacting parts (people) that form a whole which is part of a containing whole (society), which, in turn, is part of its containing system (the natural environment) – an holonic system in which the parts are interdependent.



HOLON IMAGE

The fundamental distinction of human social systems is that they are purposeful as a whole and that their interacting parts (people) are also purposeful. These purposeful parts may also interact with other purposeful parts outside the system and with non-purposeful parts (such as mechanisms) within and outside the company to engage in activities and processes.

While people, as wholes, are purposeful, their parts are not: this is a fundamental breakdown in the model and metaphor of companies as bodies. In fact, corporation and ‘incorporate’ derive from corpus, the Latin for a body. The notion of a BoD as ‘the brain of the organisation’ must be interpreted in the light of the brains in all the human beings that comprise the company! While the board may be accountable, governance is a distributed responsibility across the entire organisation.

A **purposeful system** is one that acts with intent to achieve goals using means it too may set and change – they have volition or free will, after all. Social systems, such as companies, not only learn and adapt, but they can also create; they can also change their purpose and the means of accomplishing the purpose of the organisation.

To understand a social system then, one must not only know the purpose or ends (goals) of the parts of the system (the company) and the containing (socio-economic) system, but also know how these affect their interactions and the impact of the interactions. At a fundamental level, society (the containing whole) ultimately will assign value to the company. This is why it is so important to consider situations ‘from the outside’, which is also why having ‘outside’ directors is so advantageous.

Managing a social system requires dealing with ends that may be in tension or even conflict at any or all levels of the system. An integrated whole is established when the ends and means of the parts (people in the system/

company) are congruent; that is, when their interaction is shaped by a common ethos and directed at the purpose (or ends) of the whole company.

A company has the potential to be efficient (meaning it minimises wasteful processes), effective (meaning it produces outputs from inputs), and effectual (meaning it accomplishes goals). Thus, from this perspective, management – the responsibility of the BoD – is about achieving coherence, congruence, and collaboration of the parts to accomplish common goals congruent with the goals of the whole.

This is aesthetics in practice!

## The nature of social systems

The most fundamental aspect of social systems is interdependence of the parts – the parts are interconnected and the action of one part affects the other parts. If its actions do not, then it is not part of the system. The interactions of human beings in a system, determine the nature and behaviour of the system (the company as a whole).

Unfortunately, the consequence of the interconnection, interdependencies, and interactions is that the nature and behaviour of social systems is somewhat troublesome and ornery: it challenges management of the company and social system by directors and executives.

In the first chapter of his book on business dynamics<sup>1</sup>, John Sterman reminds us of the troublesome nature of systems with tightly and dynamically coupled, purposeful component parts (i.e. people). The interactions lead to dynamic complexity (and there do not need to be many parts to cause complexity), and to potentially troublesome consequences and behaviours by the board and company. Some of these include:

- **Feedback**

This can be re-enforcing feedback, for example when compliance with regulations makes slow decision-making even slower. Feedback may also be self-correcting, attempting to maintain the *status quo* of the days and ways before the regulations.

- **Time delays**

The decision to act, the time to consequential action, its effects and the feedback process after, introduce delay (from decision to arrival of feedback). Delay can also have consequences for the system that are not intuitive. Delayed negative feedback can cause large swings in the behaviour and state of the system: the swings between ‘excess stock’ and ‘out of stock’ in supply chains, for example. Delayed feedback is also a feature of ‘boom and bust’ economic cycles, such as the property market.

- **Self-organisation**

Functional (and dysfunctional) organisation behaviour arises spontaneously from people’s interactions. This means, for example, that the flow of information and effective hierarchy may differ from the formal organogram – and this might be good or bad for the organisation. A clique (a small self-serving group) is an example of self-organisation that is not usually good for the organisation.

- **Non-linearity**

The relationship between input and output is non-linear: small causes can lead to massive effects and vice versa. A CEO’s casual comment, overheard by a single employee who distributes the comment on social media, may create massive disruption across the entire organisation. On the other hand, many (about 75% on average) large-scale, expensive change management initiatives fail to deliver the expected changes.

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<sup>1</sup> John Sterman. Business Dynamics. Boston; Irwin McGraw-Hill; 2000

- **Adaptation**

Complex social systems can learn and adapt, and the adaptation may or may not be beneficial to the system. Of course, some just do not learn or adapt – this is a cause of the so-called Founder's Syndrome, a common feature of entrepreneurial companies, for or not for profit, where the founder or founders of the organisation hold and maintain disproportionate power and influence long after the establishment of the entity.

On the other hand, the likelihood of successive, successful adaptations to changes in the organisation's environment declines exponentially with each adaptation. Clearly, this is not good for organisation longevity.<sup>2</sup>

- **History dependence**

Decisions and actions of the past may be irreversible, as might their effects. Reckless expenditure may render a company irrecoverably insolvent.

- **Counterintuitive behaviours**

The policies and best practices we put in place frequently evoke unanticipated responses that seem to be contrary to what we thought would happen. For example, a simplistic but common example is implementing across-the-board termination of new appointments to save expenses and increase profit. Instead, what you see is good people leaving, and productivity, revenue and profits declining. Another example is when companies decide that to meet short-term profit targets or offer bonuses to executives they need to reduce expenditure in new ventures. The company loses competitive advantage and goes into decline.

- **Unintended consequences**

Unintended consequences are unforeseen outcomes (positive, negative, or perverse, even no change) of a purposeful action or decision that differs from the expected results. These consequences arise because of the inherent complexity of systems, incomplete analysis, or misunderstanding of how individuals or groups will react to the action taken.

- In their 2008 *Harvard Business Review* article, 'Leading from the Boardroom', Jay Lorsch and Robert Clark, write: 'Directors are expected to ensure their firm's compliance with an ever-evolving set of regulations ... However, focus on compliance produced some negative and unintended consequences for boards – the most critical one being directors' loss of focus on ensuring the long-term success of their companies.'<sup>3</sup>

- **Policy resistance**

Counterintuitive behaviours, feedback and delays cause policy resistance in complex systems: policies are often 'delayed, diluted or defeated'<sup>1</sup> – and may lead to contrary effects. Two thirds of strategic plans underdeliver, most commonly due to execution failure. Sometimes our best attempts to solve problems may make them worse. For example, food relief reduces the price of food to zero, but this in turn renders profitable local farming impossible, which means a decline in food production and long-term food insecurity and constant reliance on food relief. This affects commercial and micro-farmers and the society that depends on them.

In short, it impossible to manage people, their process and their organisations in the same way that one can manage a machine: simple cause and effect are not the reality, simply implementing principles and best practices in corporate governance is neither necessary nor sufficient to ensure the smooth running of the system – the past quarter of a century of trying this has proven that.

The Scottish farmer poet, Robert Burns, explained to a field mouse whose nest he had accidentally disrupted that, 'The best laid schemes o' Mice an' Men Gang aft agley'<sup>4</sup>. In other words, no matter how carefully one plans, something may still go awry. The people in charge are not necessarily in control, even though they may have the authority to, and do take charge to control events towards a specific outcome.

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<sup>2</sup> Stuart Kauffman. Escaping the Red Queen Effect. *The McKinsey Quarterly*, 1995 Number 1, pp. 118 – 129.

<sup>3</sup> Jay Lorsch and Robert Clark. Leading from the Boardroom. *Harvard Business Review*, April 2008.

<sup>4</sup> Robert Burns. To a mouse on Turning Her Up in Her Nest With the Plough ... 1785

But BoDs need to be humble about their ability to control the behaviour of people in the company and, therefore, the future of their companies.

At best, boards can and should strive to have a positive, determining influence on their companies and the accomplishment of success. That good companies have good boards is generally true, as is the opposite.

And it is most gratifying being a director on the board of a successful company. Success is difficult to achieve and sustaining the success is a significant challenge. Unless well planned, company failure destroys value and causes harm that could be avoided. Moreover, managing a company successfully increases the economic contribution of the company to society – financially and non-financially.

## **COMPANIES ACT AND THE MOI**

What follows is a plain English (i.e. non-legalese) summary of key aspects of the extracts from Companies Act. It is not a substitute for reading the Act but might make doing so a little easier. (See Appendix 2.1 for more on extracts of NPC law relevant to directors).

Compliance with the rules of golf does not make golfers good at the game, but good golfers play within the rules. Similarly, compliance with the Act will not result in good governance or success of the company. However, directing within the law is obligatory and good companies do innovative business within the law. Every director, prospective director, and prescribed officer must be familiar with key aspects of the Act so that, individually and collectively, they operate within the law and can take on their responsibility to manage or direct the management of the company.

## **SOLVENCY AND LIQUIDITY**

It is not coincidental that one of the first sections of the Act is on solvency and liquidity. The bottom line: directors must ensure the company has sufficient cash, or access to sufficient cash, to meet its obligations to pay its creditors when payment is due.

The board should make it a priority to endure. One requirement is that a company should have cash reserves, or access to cash, which will see the company through times of inadequate or (even a brief period of) zero revenue – each board must apply its mind to determining the quantum of that reserve. The healthy company also ensures that it can attract or generate funds to take on new projects while waiting for more substantial capital.

Even an NPC should make a profit and/or generate net cash excess, even if it may not distribute the cash to its members for their financial gain (see Appendix 2.2).

## **LEGAL STATUS AND THE MOI**

The MoI is the constitution of a company as stipulated by the Act, and the board and its company must act within the MoI. The MoI replaces the Articles of Incorporation and Association of the ‘old’ Companies Act 61 of 1973 (see Appendix 2.3 for NPCs).

The MoI must be submitted to CIPC on application for registration of the company. Changes to the MoI require a special resolution of the shareholders or members (>75% of members at the meeting, or their proxies, must vote in favour of the change). Even though short- and long-form ‘standard’ MOIs can be downloaded from the CIPC website, it is always sound to have a legal professional with in-depth understanding of the Act to guide the board on the MoI and any changes to it.

In essence, the MoI commits the company to comply with the Companies Act. It also elaborates how the Act applies to the company in respect of the few unalterable provisions of the Act – there are guides to alterable provisions, but it really is best to consult appropriate professionals to avoid problems down the line.

Any MoI must include details about the:

1. Incorporation of the company as a company
2. Objects and powers of the company
3. Status of the MoI and company rules
4. Optional provisions of the Act that do not apply to the company (see about (consulting professionals)
5. Composition of the BoD, how they are appointed and their term of office
6. Authority of the BoD and its committees (for NPCs these are not to be confused with members' committees of voluntary associations)
7. Indemnity of directors
8. Officers appointed by the BoD

## TRANSPARENCY, ACCOUNTABILITY, AND INTEGRITY OF COMPANIES

Section 19 of the Act confirms the legal status of the companies: they are juristic persons with powers to act within the Act and MoI.

**Liability:** A director is not liable for any liabilities or obligations of the company, solely by reason of being a director, except to the extent that the Act or the company's MoI provides otherwise. However, under South African law, directors and prescribed officers can be held liable for a variety of legal wrongs, including breach of fiduciary duty (see 'Standard of Conduct', Section 76), fraud, breach of contract, and negligence. Directors may incur liabilities if they infringe on the Act, breach their duties towards their companies, behave recklessly or negligently, or commit crimes such as fraud (see Sections 76 and 77 and the summary below).

Nevertheless, unless the MoI prohibits, the company may take out insurance to protect directors and prescribed officers against liability and related expenses. However, they may also seek restitution from the director or prescribed officer who is found guilty of negligence or recklessness.

**Record-keeping:** Sections 23 to 34 of the Act elaborate numerous aspects of financial and administrative standards and records for companies. This is, essentially, good housekeeping. It is wise for a board to assign a director, officer, or an external party to ensure that the company's records are in good order and readily available to directors and members. There should be both physical and, although not mandatory, digital records of the documents and of documented compliance with relevant laws and regulations. Secure digital is advisable. Company information and correspondence should also be stored securely on the internet as this enables access and smooth succession.

**Corporate calendar:** It is also advisable, but not a legal requirement, for the BoD to have a corporate calendar that records and reminds directors and officers of deadlines for submissions to various authorities (CIPC and SARS, for example), banks and other third parties such as donors. Generally, this task is not demanding – it just requires discipline: good record-keeping, attention to detail, and commitment to honouring deadlines.

Sound administration may not be exciting, but it is essential. It saves the time and money of fixing failure to administer well. In some companies, administration is one of the tasks of a company secretary, whose duties are elaborated in Section 88 of the Act. Private companies and NPCs are not required to appoint a company secretary (Section 10 (2) d), unless specified in the MoI or Section 30(7) of the Act. Even so, Parts B (Sections 86 to 89) and D (Section 94) will not apply.

**Assurance of financial statements:** Companies must produce annual financial statements within six months of the end of its fiscal year. Consult a professional to determine whether the company or the company you wish to incorporate requires a review or an audit. This is a material consideration.

It is beyond the scope of this primer to go into the details of review and audit. Suffice it to say, it is the BoD's responsibility to keep sound financial records and to produce annual financial statements, to have them reviewed or audited, to have them approved by its members (if the NPC has members), and to submit them to CIPC timeously every year (together with the required feeds). These records will almost certainly be required by providers of capital.

Here is a summary on the need for an audit or independent review of the company's annual financial statement. It is based on the Companies Act and guidance from the South African Institute of Chartered Accountants (Saica):

ASPECT	AUDIT	INDEPENDENT REVIEW
Applicable to	Public companies State-owned companies Private companies if: • PI score $\geq 350$ , or • PI score $\geq 100$ and financials are internally compiled	Private companies with: • PI score $< 350$ and financials independently compiled • Not owner-managed
PI score (Public interest)	Mandatory if PI score $\geq 350$ or $\geq 100$ with internal compilation	Optional if PI score $< 350$ and financials are independently compiled
Performed by	Registered auditor (RA)	Independent reviewer (can be a CA(SA) or another qualified professional)
Objective	Provide reasonable assurance that financials are free from material misstatement	Provide limited assurance that no material modifications are needed
Level of assurance	High (reasonable assurance)	Moderate (limited assurance)
Procedures	Extensive: includes risk assessment, internal control testing, substantive procedures	Limited: primarily inquiry and analytical procedures
Report issued	Auditor's report	Independent review report
Cost and complexity	Higher due to depth of procedures	Lower due to limited scope
Regulatory oversight	IRBA (Independent Regulatory Board for Auditors)	Not necessarily under IRBA unless performed by a CA(SA)

To cover all your bases read Section 10 (2) d of the Act and obtain professional advice.

## PROTECTION

If directors and prescribed officers are diligent, seek out information and seriously consider it before making decisions, they will not be held liable for losses of the company, provided the decision was made in what seemed, in their considered judgment, to be in the best interest of the company.

Nevertheless, they remain accountable – they must explain but will not take blame in the sense of incurring personal financial liability (as explained in Section 76 (4), the so-called ‘business judgement rule’). After all, ‘The best laid schemes o’ Mice an’ Men Gang aft agley’.<sup>5</sup>

Directors should also make sure that they are fully informed about the company’s activities and that they are only taking decisions that they consider to be in the best interests of the company and not for personal benefit. They should attend all board meetings and actively participate in the decision-making process.

Directors should also be aware of the company’s financial position and not trade recklessly (i.e. the NPC has cash to settle creditors on time), should ensure that the company is complying with all relevant laws and regulations, and take timely steps to address any problems that are identified.

## THE ACT HIGHLIGHTS SIMPLIFIED

A minimum requirement for any director before taking on directorship is to read the Companies Act. But this is where so many directors come short – they don’t read it and the company doesn’t push it. They simply include the section numbers and expect people who accept directorship to confirm they have read and understood these sections of the Act.

The basic requirements expected of directors are set out in Part F of Chapter 2 of the Act, with which every director must be familiar. These include, but are not limited to, information about shareholders and prescribed officers, the election and removal of directors, the director’s personal financial interests, and board committees and meetings.

Below is a simplification in plain English of the key understandings of the specific sections required of anyone who wants to be or is a director. Nevertheless, I strongly urge you to read the full sections. Ignorance is not a defence against their unlimited civil and criminal potential liability should you fall foul of these clauses. Business mistakes are forgiven, not fiduciary.

### Who does this apply to?

Governance of companies is the unequivocal responsibility of directors. But a prescribed officer (defined in Regulation 38 of the Act), who is not appointed or elected to the board, may nevertheless be considered as a director if, for all purposes of the Act, that person:

- Exercises general executive control and management over the whole, or a significant portion, of the business and activities of the company; or
- Regularly participates, to a material degree, in the exercise of general executive control and management over the whole, or a significant portion, of the business and activities of the company.

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<sup>5</sup> Robert Burns. To a mouse on Turning Her Up in Her Nest With the Plough ... 1785

The status of the prescribed officer is particularly important in respect of standards of behaviour and potential liabilities as elaborated in Sections 76 and 77, respectively. My suggestion is to assume you are a prescribed officer if you are appointed to a senior management position and/or regularly attend and participate in senior management or board meetings.

## **Simplification of Sections 69 and 75 – 77 of the Companies Act**

Part F of the Companies Act elaborates Governance of Companies. No person should accept directorship before becoming familiar with:

**Section 69** Ineligibility and disqualification of persons to be director or prescribed officer.

**Section 75** Directors' personal financial interests.

**Section 76** Standards of directors' conduct.

**Section 77** Liability of directors and prescribed officers.

As stated, this a simplified summary in plain English of the specific sections required of anyone who wants to be or is a director. As also stated, this is only a summary and you must still read the full sections to equip yourself properly for the position. This simplification is just that – it does not replace the need to become familiar with the published act.

### **Section 69 – Ineligibility and disqualification of directors**

#### **1. Definition**

'Director' includes current, former, and alternate directors, prescribed officers, and committee members, regardless of board membership.

#### **2. Restrictions on ineligible or disqualified persons**

Such persons cannot:

- Be appointed or elected as a director
- Act as a director

#### **3. Company responsibility**

A company must not knowingly allow an ineligible or disqualified person to serve as a director.

#### **4. Immediate cessation**

- A director who becomes ineligible or disqualified while serving must cease to be a director immediately.

#### **5. Probation**

- A person under court-ordered probation cannot serve as a director unless permitted by the probation order.

#### **6. Additional restrictions**

A company's Memorandum of Incorporation can:

- Add more reasons for ineligibility or disqualification.
- Set minimum qualifications for directors.

## **7. Ineligibility criteria**

A person is ineligible if they are:

- A juristic person.
- An unemancipated minor or under similar legal disability.
- Not meeting the company's specified qualifications.

## **8. Disqualification criteria**

A person is disqualified if:

- A court prohibits them from being a director or declares them delinquent.
- They are:
  - An unrehabilitated insolvent.
  - Prohibited by public regulation from being a director.
  - Removed from a position of trust for dishonest misconduct.
  - Convicted and punished (without the option of a fine) for specific crimes, including theft, fraud, forgery, or related offenses.

## **9. Duration of disqualification**

Ends five years after the removal from office or completion of the sentence, unless extended by a court.

## **10. Extension of disqualification**

- The Commission can apply for extensions.
- The court can extend disqualification by up to five years at a time if needed to protect the public.

## **11. Court exemptions**

Courts can exempt individuals from disqualification under certain circumstances.

## **12. Private company exception**

A disqualified person can be a director if they and their relatives hold all shares and consent in writing.

## **13. Public register**

The Commission must maintain a public register of disqualified persons and those under probation.

## **Section 75 – Director's personal financial interests**

### **1. Definition**

'Director' includes alternate directors, prescribed officers, and members of the board or audit

committees, even if they are not board members.

## **2. Exceptions**

This section does not apply to a director if:

- The decision affects all directors generally.
- The decision affects a class of persons that includes the director, unless the class only includes the director or their related persons.
- The decision is about removing the director from office.

This section does not apply if:

- One person holds all issued securities and is the only director.

## **3. Single director conditions**

A sole director who does not hold all issued securities cannot:

- Approve agreements where they or a related person has a personal interest.
- Make decisions on matters where they or a related person has a personal interest.

Such agreements or decisions must be approved by shareholders after full disclosure.

## **4. Advance disclosure**

Directors can disclose personal financial interests in advance by submitting a written notice to the board or shareholders, which remains effective until changed or withdrawn.

## **5. Meeting protocol for interested directors**

A director with a personal financial interest in a matter to be considered at a meeting must:

- Disclose the interest and its nature before the meeting.
- Provide any material information related to the matter.
- Share insights if requested by other directors.
- Leave the meeting after making disclosures.
- Not participate in the decision-making process.
- Be counted for quorum but not for voting on the resolution.
- Not sign any related documents unless directed by the board.

## **6. Post-approval disclosure**

If a director acquires a personal financial interest after a matter is approved, they must promptly disclose the interest and relevant circumstances to the board or shareholders.

## **7. Validity of decisions**

Board decisions or agreements are valid despite a director's personal financial interest if:

- Approved according to this section.
- Ratified by an ordinary resolution of the shareholders.

## **8. Court validation**

A court may validate a board or shareholder-approved transaction or agreement despite a director's failure to meet disclosure requirements, upon application by an interested person.

## **Section 76 – Standards of directors' conduct**

### **1. Definitions**

'Director' includes alternate directors, prescribed officers, and members of board or audit committees, regardless of whether they are board members.

### **2. Responsibilities**

A director must not use their position or information gained as a director to:

- Benefit themselves or others (except the company or its wholly owned subsidiary).
- Cause harm to the company or its subsidiary.

A director must promptly communicate relevant information to the board, unless:

- The information is immaterial or already public/known.
- There is a legal or ethical duty of confidentiality.

### **3. Conduct expectations**

Directors must act:

- In good faith and for a proper purpose.
- In the best interests of the company.
- With the care, skill, and diligence expected of someone with similar functions and knowledge.

### **4. Satisfying duties**

A director meets their obligations if:

- They take diligent steps to become informed about the matter.
- They have no personal financial interest in the decision or comply with disclosure requirements.
- They make or support a decision with a rational belief that it is in the company's best interests.

Directors can rely on:

- Company employees believed to be reliable and competent.
- Professional advice from retained experts.
- Committees they are not part of, unless they have reasons to doubt the committee's actions.

## Section 77 – Liability of directors and prescribed officers

### 1. Definitions

- ‘Director’ includes alternate directors, prescribed officers, and members of board or audit committees, regardless of board membership.

### 2. Liability

Directors can be liable for:

- Breach of fiduciary duty (common law) for losses due to violating specific duties.
- Delict (omission) for losses from violating other legal or company provisions.

### 3. Specific acts leading to liability

A director is liable if they:

- Act without authority, knowing they lack it.
- Allow prohibited business conduct.
- Engage in fraud.
- Approve false or misleading financial statements or prospectuses.
- Fail to vote against unauthorized actions, such as issuing unauthorized shares or financial assistance.

### 4. Distribution violations

Liability for improper distributions arises if:

- The company fails solvency and liquidity tests after distribution.
- The director’s vote was unreasonable based on available information.

Liability is limited to the excess amount distributed and unrecovered from recipients.

### 5. Court relief

Directors or the company can seek court orders to set aside invalid board decisions. Courts can order rectifications, reversals, and indemnifications.

### 6. Joint liability

Directors share liability with others for the same act.

### 7. Time limit

Legal actions must start within three years of the act/omission.

### 8. Additional liabilities:

Directors are also liable for:

- Court costs unless proceedings are dropped or they are exonerated.
- Restoring any improperly paid amounts.

## **9. Court relief for honest directors**

Courts could relieve directors from liability if they acted honestly and reasonably, or it is fair to do so based on the case circumstances.

## **10. Proactive court relief**

Directors fearing a claim can apply for court relief in advance on similar grounds to the post-claim relief.

# **Indemnification and Directors' Insurance**

## **1. Definitions**

'Director' includes current, former, and alternate directors, prescribed officers, and committee members, whether or not they are board members.

## **2. Invalid provisions**

Any agreement, company document, or resolution that tries to:

- Relieve a director of their duties or liabilities.
- Limit the consequences of wilful misconduct or breach of trust by a director.

Such provisions are void.

## **3. Company fines**

A company cannot pay fines imposed on a director convicted of a national legislation offense.

## **4. Advancing and indemnifying expenses**

Unless restricted by its MoI, a company can:

- Advance legal defence expenses for a director.
- Indemnify a director for these expenses if:
  - o The proceedings are dropped or clear the director.
  - o The liability is one that the company can indemnify under subsections (5) and (6).

## **5. Indemnification**

A company can indemnify a director for liabilities not covered in subsection (6), unless restricted by its MoI.

## 6. Restrictions on indemnification

A company cannot indemnify a director for:

- Liabilities arising from:
  - Unauthorized acts, including lack of authority or fraudulent acts.
  - Wilful misconduct or wilful breach of trust.
- Fines as mentioned in subsection (3).

## 7. Insurance

Unless restricted by its MoI, a company can buy insurance to:

- Protect a director against liabilities or expenses the company can indemnify.
- Protect the company against expenses it can advance or indemnify, and liabilities it can indemnify for directors.

## 8. Restitution

A company can claim restitution from a director for any money paid in violation of these rules.

## OTHER LAWS

Companies are subject to various other laws beyond the Companies Act, such as Labour and Employment Equity laws (with specific nuances for NPCs that can be found in Appendix 2.4), the Protection of Personal Information (POPI) Act; Intellectual Property laws; tax laws; environmental laws; and laws pertaining to property management.

Consider also ‘industry specific’ laws that apply, for example activities involved in food production or delivery, healthcare or healthcare products.

The BoD should set aside time to establish which laws apply to it, ensure that the directors are aware of them and the implications attached to them, and then take steps to ensure compliance and management of significant regulatory and legal risks.

Finally, the BoD must determine if any governance codes apply to the company and if they are mandatory. It can get confusing. For example, the King IV code applies to public and state-owned companies and has a section for application by SMEs – but this is not mandatory.

There is now also King V, which was officially launched on October 31, 2025, and will replace King IV for financial years starting on or after January 1, 2026. Here are some key points to consider in the updated version...

## King V and its application to SMEs

**Proportional application:** King V is designed to be applied proportionally, meaning SMEs should implement governance practices that are appropriate to their size, nature, and complexity.

**Benefits for SMEs:** Adopting good governance practices can strengthen internal controls, support long-term sustainability, build stakeholder confidence, and improve access to finance and markets for SMEs.

**Growth and evolution:** SMEs are encouraged to progressively deepen their governance practices as they grow and evolve.

**Specific guidance:** The Institute of Directors in South Africa (IoDSA) has issued a guidance note on how SMEs should apply the principles of King V, explaining that the recommended practices for group governance are generally not applicable to them, unless the SME is part of a larger group structure.

It is therefore advisable to consult a professional in this regard.

# Roles of the Board of Directors

## DUTIES

Directors are the stewards of the company. They have a fiduciary duty to act in the best interest of the company as an entity (see Section 76 (2 and 3) and other statutory duties (to comply with and execute other duties set out in law).

A steward is responsible for managing and protecting the organisation – it is a duty of care. In other words, they oversee the business and affairs of the company. As stewards, the directors are agents of execution of certain decisions and functions. The fundamental notion underpinning stewardship by directors is trust. It is a fiduciary relationship. ‘Fiduciary’ is derived from *fides*, the Latin for trust. We trust someone when we share a value system, and we have confidence that person has the competence and will undertake that for which he or she has taken responsibility.

**Directors manage, direct, and guide the affairs of the company and stand accountable therefore to its shareholders** (or members in an NPC). This is governance. They must act with enterprise and prudence and exercise good judgment in the legitimate pursuit of the company’s objective (as expressed in the company’s constitutional documents, i.e. the MoI and Shareholders’ Agreements), as they strive towards the company’s purpose and goals.

Enterprise and prudence should not be considered as opposites – they are more like two sides of the same coin. Directors need to be prudent in their enterprise and enterprising in how they exercise prudence. This reconciliation might be captured in the notion of taking affordable risks in the pursuit of the company’s purpose into an unknowable future.

**Directors must consider the future.** In their endeavour to achieve long-term success, directors must ensure that the company is a responsible corporate citizen (in its relationship with society and the environment on which both are dependent) and that it earns the reputation of being one. One way of approaching this lofty responsibility is *primum non nocere*: First, do no harm. However, doing no harm is insufficient. A profit company is expected to make an economic profit (its legal purpose), while acting within the mores and laws of society which is a requirement of the Act (see Appendix 3 for an NPC perspective – to deliver a positive social impact while being financially responsible). If it does this, it will deliver its primary obligation: to make a positive contribution to society’s economy, but within ‘the rules of the game’.

**Directors’ responsibility includes management to manage the company or to direct its management employees.** Joan Magretta<sup>6</sup> provided a robust explanation of management: Management draws on many disciplines and involves numerous processes. It is a discipline (some would say a craft) comprising both applied sciences and the liberal arts. Its goal is to make organisations work well through people, systems, relationships, and the deployment of resources. This too is an aesthetic notion ... a far cry from ‘the buck stops’ here, command and control image of heroic management.

Boards of small companies often undertake management responsibilities. However, most boards of companies with significant scale delegate operational functions and responsibilities to a managing director or chief executive who assembles a management team to see to the day-to-day management of the organisation. The board then reserves certain functions and responsibilities for itself, such as policies, strategy and oversight, and executive functions such as deciding on and signing contracts, of a certain scale or importance.

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<sup>6</sup> Joan Magretta and Nan Stone. What management is: how it works and why it’s everyone’s business. New York, The Free Press 2002.

How management is arranged and executed should not be governed by law; it is a matter of judgement given the context of the company; an opportunity for advantage. It is advisable for the board to draw up a formal 'Delegation of Authority' that outlines the authority of the shareholders/members, the board of directors, and the chief executive. The CEO should then formalise the delegation to the members of the executive committee and so on to supervisory level.

While the board may delegate responsibility of management, it remains ultimately accountable in law. So, for example, the managing director (MD) or a non-director CEO may develop a strategy, but the board might need to provide input and approve the strategy for which it is accountable to the shareholders/members.

## DIRECTORS' QUALITIES AND BOARD COMPOSITION

Section 69 of the Act describes who is ineligible or disqualified from being a director. However, excluding what one does not want does not necessarily deliver what one does want or need. So, what are the desirable qualities of directors? The sum of evidence seems to suggest the following qualities, which are not a requirement of law, although some are implicit.

### TRUSTWORTHY

All directors have a fiduciary relationship with the company: they are trusted to serve the best interest of the company to the exclusion of other interests. Trustworthiness is the primary and absolute criterion in the selection of directors. In a 2006 Harvard Business Review piece, Robert Hurley provided a useful framework on how we make the decision to trust someone.

### Ten key factors influencing the decision to trust

Hurley's model identifies ten variables that determine whether someone will choose to trust in any given situation. These fall into two categories, namely individual factors and situational factors.

#### *Individual factors* (about the trustor)

- **Risk tolerance:** More risk-tolerant individuals are more likely to trust.
- **Adjustment:** Well-adjusted individuals tend to trust more easily.
- **Relative power:** Those with more power feel safer trusting others.

#### *Situational factors* (about the trustee and context)

- **Security:** Is the environment psychologically and materially safe?
- **Similarity:** Shared values or backgrounds increase trust likelihood.
- **Alignment of interests:** Trust rises when goals are mutually beneficial.
- **Capability:** Competence and skill build trust.
- **Predictability and integrity:** Consistent behaviour and ethical conduct matter.
- **Communication:** Frequent, honest, and transparent communication fosters trust.
- **Benevolent concern:** Demonstrated care and empathy strengthen trust.

Perhaps boards could develop their own criteria and a framework for establishing trust, but perfection will always be elusive and there may be disappointments. Whatever the context, a rigorous process of interviewing candidates – and those who know the candidates – is crucial to the evaluation of trustworthiness. Two criteria seem to be fundamental to trustworthiness, namely:

- *Probity*: This is the quality of having high moral standards, honesty, transparency, integrity and decency. A universal and primary stop-go requirement, probity is difficult to establish.
- *Business acumen*: This is all about competence and proven capability to be effectual (in other words, achieving goals). It relates to the set of knowledge, skills, expertise, and experience that allow directors to assess the company's business context and link that to what it can do and what assets it can assign to deliver a meaningful impact relevant to its object.

Directors must have a deep and systemic understanding of the company's business model and its drivers of economic and social value. New directors may not have that level of understanding when they join but must commit to acquiring the required level of competence so that they gain the trust of their peers and the CEO.

## **SPECIFIC EXPERTISE**

It is sometimes necessary for the board to have some directors with specific expertise (a combination of relevant knowledge, understanding, skill and experience), such as financial auditing in a profit company or archiving or research in a non-profit company.

Indeed, it is incumbent on boards to regularly evaluate the expertise represented on the board relative to the required diverse expertise and to ensure that crucial gaps are filled. It may be preferable to outsource that expertise for a short-term requirement and that is a judgment call made by the board when the need arises, bearing in mind that directors and prescribed officers have a fiduciary duty to the company while advisors do not.

In a recent case of food contamination in a company which is in the food industry, there was no director with expertise in food production, let alone safe food production. The consequence was an outbreak of avoidable infectious disease that caused death and millions of Rands in public liability.

## **SYSTEMS THINKING**

Good directors can deal with the complex dynamics of an interconnected business world. They are able to consider the interacting parts of the company in the context of their and the company's interaction with the containing systems (society and the environment). They are comfortable with long time horizons and the accompanying uncertainty of the future.

## **SOCIAL SKILLS AND SIZE**

A cynical John Carver once commented that: 'Boards tend to be incompetent groups of competent individuals.' A board of directors is a peer group, the members of which require social skills to work collaboratively and effectively as peers and within a diverse group of individuals who may (and should) have different perspectives. The goal is a diverse group of individual experts who become an expert board – a group or team.

But diversity is a double-edged sword: it creates an opportunity for rich conversation and the generation of new thinking, but it is also the force behind dysfunctional behaviour that leads to dysfunction, even disintegration, of the board and its inability to fulfil its duty.

It's not just diversity of skilled inputs that's under consideration here, but also the literal number of directors. The BoD of a PC must comprise at least one and an NPC must comprise at least three directors (Section 66 (2)b). There is evidence to suggest that the optimal number of people in an 'in-person' group that must make decisions, such as a BoD, is an odd number of five or seven.

This is a complicated issue as much depends on the social acumen of the individuals, the complexity of the work, and the life stage of the company. It would seem from the evidence that three is too few for a BoD and more than seven is too many. While there is no hard and fast rule, less is more – up to a point. Whether even or odd numbers depends how the board deals with different perspectives and an opinions impasse.

## **INDEPENDENCE**

Most governance codes emphasise the importance of independent directors. Superficially, the notion is seductive, but a useful definition is elusive (governance codes for NPCs that can be found in Appendix 2.5).

In some codes, independent directors apply their minds independently of bias (other than towards the good of the company) and the absence of a conflict of interest. But this is obvious in the context of directors' fiduciary duty. Sometimes the definition includes 'perceived conflict' – well, that is the problem of the perceiver, not necessarily of the perceived director. Independence of ties to the company and its officers has been used as a surrogate for independent critical thinking, but this approach to independence has not been successful.

Even so, we are all subject to bias of one sort or another, which may not readily be appreciated by others, and this bias may also significantly affect decision-making. It is possible for an individual to be objective in mathematics for which there are rules of engagement, but not when it comes to the human condition. Objectivity in human affairs is approximated by well-functioning groups whose members have diverse perspectives – which are biases!

## **ENDS AND MEANS OF GOOD GOVERNANCE**

A fundamental problem with codes for good governance is that they focus mainly on the means. In other words, they espouse a set of means which, if followed, will apparently lead to good governance of organisations. However, the best means selected to achieve goals are specific to the context of the organisation.

It is misguided to recommend a single set of best means of managing/directing companies. Such an approach is well-suited for ensuring a well-running motor vehicle, not a social system. The context of companies is ever-changing, and it is a feature of social systems (with their purposeful parts) that there are numerous means for achieving goals. There are many ways to skin a cat, as the adage goes.

For example, there is just no consistent empirical evidence to support the widely recommended notion that the CEO and chair of the board must be different people. Separation of the roles is not a consistent determinant of either good governance or success.

What is far more useful is to define the ends (goals) of good governance and to define what the board should or wishes to accomplish. The ends may change or need to change over time.

There is a greater likelihood of arriving at a modest set of universal ends of governance (rather than means)

but, even if that is so, it is a useful task for the board to consider and set out for itself what it wants to accomplish and report to its shareholders/members.

Here's a great example created by Hermes, a UK investment managing firm, that set out ten governance ends for PCs and available on their site, [www.hermes-investment.com](http://www.hermes-investment.com):

### *The Hermes Principles*

1. Honest, open dialogue
2. Systems in place to identify value-maximizing activities and skills
3. Investment plans tested for long-term value
4. Capital allocated to exploit core growth opportunities rather than unrelated diversification
5. Cost-effective incentives to maximize long-term value
6. Efficient capital structures to minimize long-term costs
7. An accurate understanding of the strengths of the business model and of the forces driving growth
8. Clear insight into why the company is the 'best parent' of any business
9. Effective relationships with stakeholders; regard for the environment and society as a whole
10. Measures that minimize the transfer of adverse costs to society at large

The ends may be radically different for an NPC. A useful exercise for the board of an NPC would be to use this model as a guide to arrive at its own ends of good governance of the NPC and to seek guidance and support from its members.

## **KEY CHALLENGES FOR DIRECTORS AND BOARD**

The work of a BoD is not just about compliance with the law, even though that is crucial. The real challenge is to accomplish goals in an uncertain future, the outcomes of which are beneficial to the organisation and its intended beneficiaries. It might sound simple enough but it's a significant challenge: about seventy percent of strategies and plans to change for the better fail to deliver the intended outcomes.

There is no simple recipe for success with complex social systems operating in a dynamically complex and ever-changing world. H.L. Menken, the journalist and essayist, once commented wryly: 'For every complex problem there is an answer that is clear, simple, and wrong.'

The subject of group dynamics and organisational success is important and worthy of detailed review but is beyond the scope of this introductory text. While it is tempting to assign blame to external factors, the reality is that more than ninety percent of organisation failures are internal in origin, even if external events precipitated the failure. Pogo, the amiable, philosophical possum created by Walt Kelly in the late 1940s summed it up for us: 'We have met the enemy, and he is us.'

Some clues as to how this situation comes about were described in the section regarding the troublesome nature of human social systems.

The purpose of the following sections is to alert directors and prospective directors to some key issues and to encourage them to study them further.

[QUOTE] 'The key [to the high performance of boards] ... lies in the working relationships between boards and managers, in the social dynamics of board interaction, and in the competence, integrity, and constructive involvement of individual directors.' – David Nadler, *Building better Boards*, Harvard Business Review, May 2004

## CULTURE OF A HEALTHY BOARD

### What makes great boards great?

‘It’s not the rules and regulations. It’s the way people work together.’

– Sonnenfeld, Harvard Business Review

- |   |  |
|---|--|
| <ul style="list-style-type: none"><li>• Respect, trust, and candour</li><li>• Open, constructive dissent</li><li>• Information sharing</li><li>• Portfolio of roles</li></ul> | <ul style="list-style-type: none"><li>• Individual accountability</li><li>• Evaluate performance of individuals and group (measure the value they add)</li></ul> |
|---|--|

Social dynamics can only be evaluated once the board has started to work, and the odds of a group of experts working well together are stacked against them. All the shareholders or members can do is to try to determine that the directors they elect have a history of being able to work effectively in a peer group.

Such groups have usually displayed candour, information sharing, collegial behaviour, and constructive dialogue. Thereafter, it is up to the person in the chair to direct appropriate behaviour and deal effectively with inappropriate behaviour.

Finally, shareholders or members should engage the board in constructive discussion about what is going well and what is not.

## BOARD CONVERSATIONS AND CULTURE

Much of the board’s work is about discussing information and ideas to arrive at an understanding from which they apply their wisdom to make decisions on policy, strategy, and running of the company well. Superior quality discussions are an energising feature of effective boards. Dysfunctional discussions are a dismal feature of ineffective boards.

### [QUOTES]

‘Boards should be seats of challenge and inquiry that add value ... the high-performance board ... is competent, coordinated, collegial, and focused on an unambiguous goal.’ – David Nadler, ‘Building Better Boards’, Harvard Business Review, 2004

‘[Boards should] build a context in which exciting conversations can occur, so that people can learn something new about themselves or others, discover new insights, hear and make counter intuitive arguments, and come to creative and novel solutions to problems.’ – Lynda Gratton and Sumantra Ghoshal, ‘Improving the quality of conversations’, [Organizational Dynamics](#). 2002

‘Conversation ... is the magic dust that underpins board effectiveness.’ – Tomorrow’s Company, ‘Improving the Quality of Boardroom Conversations’, May 2015

Gratton and Ghoshal’s taxonomy of business conversations is useful. Their approach is based on the mix of

technical authenticity (e.g. analysis and rationality) and emotional authenticity (e.g. belief systems, feelings, and meaning). Although they did not explore the application of their taxonomy to boards of directors, each species of discussion has its place among directors and requires appropriate time, space, and business context.

### A map of conversations

		High	
<b>Analytical rationality</b>			
	Low		
		Low	High
		<b>Emotional authenticity</b>	

Lynda Gratton and Sumantra Ghoshal, 'Improving the quality of conversations', [Organizational Dynamics](#), 2002

**Dehydrated talk** is neither technically nor emotionally authentic. However, while it is dry and ritualised, it is sometimes appropriate, for example when correcting and approving minutes and for declaration of interest in a matter before the board. Dysfunctional dehydrated talk tends to dominate board discussions when rules, usually unwritten, formalise how people are addressed and who speaks when, for how long and on which subjects. It also dominates when the setting is one of constraints and there's a 'We must be done by noon!' mentality with an insufficient allocation of time for exploration and discovery.

**Disciplined debate** is technically but not emotionally authentic (although debate may generate emotions). It is purposefully created conflict. Healthy board debate is a Socratic dialectic of thesis, antithesis, and synthesis. It is a robust, rigorous routine that directors can use to arrive at decisions, such as decisions on investing in new projects.

Important ingredients for productive, disciplined debates are access to the same information, fair process, and clear and consistent decision-making criteria. While useful, debate is constrained to discrete, known options and, therefore, is not in itself a creative process.

Even after healthy and robust debate, decisions may fall into some of the traps of decision-making, such as bias towards confirming evidence and maintenance of the status quo. Disciplined debate may be preceded or followed by creative dialogue – this can be very useful in arriving at solutions based on synthesis, after considering options and dealing with dilemmas.

**Creative dialogue** is technically and emotionally authentic verbal exchange of thoughts among peers. Its purpose among directors is synthetic, creative, and decisional: to develop new insights and understanding from different perspectives; to decide what is right and good; and, ultimately, the application of wisdom on what is right in the pursuit of the company purpose – and, of course, to not do what is wrong. The form of creative dialogue is captured in the somewhat oxymoronic phrase: structured, but flexible.

Creative dialogue requires preparation, adequate time, and no distraction. Active, articulate participation is essential for creative dialogue. It takes time for boards to develop a willingness to ask big, broad, and deep questions and for individual directors to express a point of view. It also takes time and inquisitiveness and maturity to be open to consideration of different perspectives, to go beyond compromise and, perhaps, to finding creative solutions that are even better than win-win.

**Intimate exchange** has low technical but high emotional authenticity, and it more readily takes place in informal settings. It is an opportunity for directors to exchange what they stand for, to demonstrate care and trust, and to enjoy a modicum of humour. Intimate exchange is the portal to a collegial or friendly atmosphere in formal board meetings, to a unity of purpose and *esprit de corps*, which is common to effective boards and missing from ineffective boards.

Effectual boards develop a rich social context that enables healthy conversations. Such a social context makes directorship energising, satisfying, and worthwhile. Its features include:

- Mutual trust and transparency to promote congruence between what directors think, say, and do, which enables the candid exchange of thought
- Self-disciplined work that delivers on promises
- A moral purpose and clear business goals
- An energising ethos (character) that creates clear, but wide boundaries for the direction and content of discussion and that reflect the directors' fiduciary duty

## COMMON TRAPS IN DECISION-MAKING

[QUOTE] 'Where do bad decisions come from? In many cases, they can be traced back to the way the decisions were made – the alternatives were not clearly defined, the right information was not collected, the costs and benefits were not accurately weighed. But sometimes the fault lies not in the decision-making process but rather in the mind of the decision maker. The way the human brain works can sabotage our decisions.' – John S. Hammond, Ralph L. Keeney, and Howard Raiffa, 'The Hidden Traps in Decision Making', Harvard Business Review, 1998

There are so many 'innocent' causes of bias in decision-making, which have nothing to do with conflict of interest or unethical intent.<sup>7, 8, 9</sup> These unconscious biases have led to the description of human beings as 'predictably irrational'.

Human beings have wonderful cognitive power. Most of us like to think we make or can make rational decisions based solely on the information before us. Faced with complex dynamic systems, our power to find the best solution is fraught with difficulty because of the routines (heuristics) or mental models we use when confronted with the need to make decisions about complex issues: we tend to fall into numerous traps.

The subject has captured the imagination and research of, among others, Nobel Prize laureates, and has spawned the field of behavioural economics. According to them, some of these traps include:

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<sup>7</sup> Making better decisions – faster. Harvard Business Review. OnPoint product number 3582

<sup>8</sup> D Lovallo & O Sibony. The case for behavioural strategy. McKinsey Quarterly March 2010

<sup>9</sup> Tobias Baer, Sven Heiligtag, and Hamid Samandari. The business logic in debiasing. Available at <https://www.mckinsey.com/business-functions/risk/our-insights/the-business-logic-in-debiasing>

**Overconfidence and overestimating:** This tendency is aggravated by the logic that ‘funds go to the best projects. While this is reasonable, the probability of success is the multiple of the probabilities of success of all the factors in sequence – and we tend to be overconfident of success.<sup>10</sup> Predicting future events is fraught with problems and our tendency is to overestimate.

**Misestimating future pleasure and pain:** Somewhat related to overconfidence, it is challenging to consider just how good or bad the future may be.

**Mental accounting:** Decision-making may be influenced by where funds come from or go to, irrespective of the merit of an option. For example, it is generally easier to make the decision to invest in a tangible short-term asset than in something intangible that may provide a greater, long-term benefit (e.g. investing in employee development).

**Status quo:** There is a tendency to favour the maintenance of status quo – to stay with what is and what we know.

**Sunk cost:** Somewhat related to the status quo challenge, we tend to continue with poor projects rather than terminate them.

**Anchoring:** We tend to stay with an initial proposition, because it feels safer and less risky.

**Herding:** Everyone else is making the decision, so we should too.

**Confirmation bias:** A common problem is the tendency to seek out and accept confirming evidence and to reject evidence that does not support our view or bias.

**Framing traps:** Decisions may be influenced by the way the problem is framed. People tend to be risk averse when a problem is posed in terms of gains, but risk seeking when a problem is posed in terms of avoiding losses.

Boards must make decisions, sometimes under pressure, with incomplete information and an incomplete understanding of the future. These traps are not moral failings; they are human tendencies that stewardship requires directors to remain alert to. Therefore, tools and techniques that assist our tendency to fall into one or more common traps are useful, and the review of prior decisions can greatly assist in understanding why some outcomes were good and others were bad – to understand if our logic was right, if we fell into a trap or if we were subject to good or bad luck that was out of our control or even our thinking.

The ‘prospectoscope’ (that looks into the future) yields fuzzy images (beware of clarity), while ‘retrospectoscope’ is the most useful diagnostic tool for understanding the past and for shaping better decisions in the future – and it helps to have a credible third party to wield the instrument!

## **Abductive reasoning: The logic of plausible explanation**

One way to understand how directors exercise judgement under uncertainty is through abductive reasoning. Abductive reasoning is the process of forming the most likely explanation (hypothesis) for an observation or set of incomplete facts. It starts with a surprising or puzzling observation and creatively works backward to the theory that would best account for it. This type of ‘inference to the best explanation’ is crucial in situations

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<sup>10</sup> Spyros Makridakis, Robin M. Hogarth and Anil Gaba Why Forecasts will fail. What to do instead. Magazine: Winter 2010R, January 01, 2010, 83 – 90

of uncertainty and incomplete information, as it drives the generation of new ideas or plausible diagnoses.

### Application in enterprise stewardship

For directors in enterprise stewardship, abductive reasoning is vital for strategic foresight and risk management. Unlike deductive reasoning, which applies existing policies to known facts (e.g. applying the disaster recovery plan), or inductive reasoning, which extrapolates from past performance data (e.g. predicting next quarter’s sales), abduction is used to address novel or ambiguous challenges.

For instance, when confronted with a sudden, unexplained shift in stakeholder behaviour or a significant market anomaly, directors must use abduction to generate the most plausible root cause – the best explanation – before committing resources to a specific strategy or risk mitigation plan. It is the creative engine for hypothesis generation when navigating the complex, non-linear realities of business.

I think this makes an important point on a significant aspect of the director’s work: dealing with uncertainty from lack of information required for deductive or inductive reasoning and certainty.

### Comparison with deductive, inductive and abductive reasoning

Reasoning type	Logic flow	Starting point	Conclusion certainty	Application in stewardship
<b>Deductive</b>	General > specific	Established rules/ principles	Certain (if premises are true)	Ensuring <b>compliance</b> (e.g., if a new law applies to all firms, then it applies to our specific firm).
<b>Inductive</b>	Specific > general	Specific observations/ data	Probable (based on observed patterns)	Identifying <b>trends</b> (e.g., observing a rise in cyberattacks in the sector to generalise a need for better security).
<b>Abductive</b>	Observation > Best hypothesis	Puzzling, incomplete facts/anomalies	Plausible (the best guess)	<b>Strategic problem-solving</b> (e.g., investigating a sudden drop in market share to form a hypothesis about the cause – is it a new competitor, a shift in consumer taste, or a product flaw?).

### WHAT A GREAT BOARD BRINGS TO THE COMPANY

- Intellect and wisdom
- Guidance and direction
- Creativity
- Experience and expertise
- Stewardship and custodianship
- Lively, constructive dialogue

- Attention to the important
- Wise decisions
- A stunning return on investment (or social impact in the case of NPCs)

## **OUTCOMES FROM A GOOD BOARD**

- Creates superior economic profit
- A great place to work or volunteer
- A company valued by society for its impact and ethos

# Orientation to Stewardship

## PURPOSE OF THIS SECTION

This section introduces new directors to a **stewardship orientation** that complements, but does not replace, governance and compliance. Its purpose is not to provide techniques or tools, but to clarify **the nature of the responsibility directors assume** when they accept appointment.

It answers a simple but fundamental question:

*What kind of responsibility am I really stepping into as a director?*

## GOVERNANCE AND STEWARDSHIP: DISTINCT BUT COMPLEMENTARY

Directors operate within a governance framework defined by law, regulation, and accepted codes of practice. Governance establishes authority, accountability, and constraints on behaviour. It is essential to the legitimacy of the board and the organisation.

Stewardship addresses a different, equally important dimension: **the ongoing care of the enterprise as a living organisation through time.**

- Governance asks: *Are we compliant? Are controls in place?*
- Stewardship asks: *Is the enterprise coherent, viable, and capable of enduring?*

Effective directorship requires attention to both.

## THE ENTERPRISE AS A LIVING SYSTEM

Enterprises do not behave like machines that can be optimised once and left to run. They are **complex social systems**, shaped by people, relationships, culture, capital, and context. Their success depends not only on formal structures, but on how well these elements remain aligned over time.

For directors, this means recognising that:

- decisions have long-term and sometimes irreversible consequences
- outcomes are uncertain and cannot be fully specified in advance
- formal rules and policies cannot substitute for judgement

Stewardship begins with seeing the enterprise in this way.

## JUDGEMENT UNDER UNCERTAINTY

At the heart of stewardship is **judgement**.

Directors are routinely required to make decisions where:

- information is incomplete
- trade-offs are unavoidable
- consequences unfold over time

In these situations, good judgement cannot be reduced to rule-following or checklist compliance. It involves weighing competing considerations, testing assumptions, and remaining alert to unintended consequences.

From a stewardship perspective, decisions are best understood as **provisional hypotheses**: they are made in good faith, reviewed in the light of outcomes, and adjusted as circumstances change.

## COHERENCE AND CONTINUITY

Stewardship places particular emphasis on **coherence** and **continuity**.

- *Coherence* refers to the alignment between purpose, strategy, capital allocation, people, incentives, and culture.
- *Continuity* refers to the organisation's ability to preserve what matters while adapting to change.

Directors play a critical role in safeguarding both, especially during periods of transition such as leadership changes, shifts in ownership, strategic redirection, or periods of surplus or stress.

## PROFIT, PERFORMANCE, AND LEGITIMACY

Enterprises must be economically viable to endure. **Economic profit**, generated lawfully and responsibly, is a necessary condition for long-term survival.

From a stewardship perspective, profit is not the sole purpose of the enterprise, but it is an important **confirmation** that value is being created in a way that is recognised by markets and society. Enterprises that consistently fail to generate economic value place their future, and their legitimacy, at risk.

Stewardship therefore rejects the false choice between:

- short-term value extraction, and
- excessive risk aversion driven by compliance alone

Instead, it seeks **durable value creation**, grounded in sound judgement and coherence over time.

## WHAT STEWARDSHIP REQUIRES OF DIRECTORS

Adopting a stewardship orientation does not add new formal duties. It deepens how existing duties are understood and exercised.

In practice, it requires directors to:

- remain attentive to the long-term health of the enterprise
- resist the displacement of judgement by rules and metrics
- ask whether decisions preserve future options as well as present performance
- recognise transitions as moments of heightened responsibility

Stewardship is not a role separate from directorship. It is a **stance** that informs how directors discharge their legal and fiduciary obligations.

## A BRIDGE, NOT A DESTINATION

This Primer provides an entry point into the responsibilities of directorship. Stewardship is not something that can be mastered in advance or captured in a set of instructions. It develops through experience, reflection, and continued learning.

Further material referenced later in this Primer explores stewardship in greater depth for those who wish to integrate this orientation more fully into their board practice.

# Conclusion

Directorship is demanding but it can be stimulating and enjoyable to serve on a vibrant, high-performance board of directors. It is rewarding to have a determining influence of the success of a company and it can also be a wonderful learning experience – a utopian experience, in fact.

On the other hand, serving on a dysfunctional board is a frustrating, dystopian experience. If one is on a somewhat dystopian board, it is worthwhile seeking professional help even if the prospect of successful transformation is not great.

Understanding the law is crucially important, but then the law should slip into the background while the board applies its time and energy on its primary task: to contribute to the success of the organisation, within the legal framework, so that it is respected in its society for what it does and what it accomplishes in making the world a better place.

Stewardship, on the other hand, is the ultimate challenge of directorship and the board. **Enterprise Stewardship offers a different way of seeing and exercising responsibility in enterprise life.** It treats the enterprise as a **complex adaptive social system** embedded in a wider economy and society, and reframes responsibility accordingly.

At its core, Enterprise Stewardship holds that:

- **Judgement under uncertainty** is the primary fiduciary competence
- Decisions are best understood as **provisional, testable hypotheses**, not rule applications
- **Coherence** (between purpose, strategy, capital, people, and culture) is a causal driver of long-term value
- **Continuity through change** must be actively stewarded, especially during transitions
- **Economic profit**, generated morally, is essential – because only enterprises that create real economic value can survive, thrive, and remain legitimate in society's eyes

Enterprise Stewardship does **not** replace governance. It addresses what governance cannot do on its own.

- Governance legitimises authority and constrains abuse
- Stewardship enables judgement, coherence, and evolutionary fit through time

They are complementary – but not interchangeable.

The question directors must continually ask themselves is this: are we exercising sound judgement, under uncertainty, in ways that serve the best interests of the company and contribute to its core object – the generation of value that is economically real, socially legitimate, and capable of enduring?

# Appendix A: Close corporations

Close corporations (CCs) occupy a vital space in South Africa's enterprise landscape. Though structurally distinct from companies governed by the Companies Act, CCs are no less subject to governance expectations – and their members carry direct, personal responsibilities that mirror those of company directors. This annex outlines the core duties of CC members and affirms the relevance of stewardship principles in this context.

## 1. The nature of governance in CCs

In a CC, members are both owners and managers. There is no separate board of directors; instead, governance is embedded in the daily decisions and strategic direction set by the members themselves. This fusion of ownership and control demands clarity, discipline, and a strong sense of stewardship. Members are not merely participants – they are custodians of the enterprise.

## 2. Legal duties of CC members

The Close Corporations Act 69 of 1984 codifies the governance obligations of members. Key provisions include:

- **Fiduciary Duty (Section 42)** Members must act honestly and in good faith, placing the interests of the corporation above personal gain. Conflicts of interest must be disclosed and avoided.
- **Duty of Care and Skill (Section 43)** Members are expected to manage the corporation with the diligence and competence of a prudent person managing their own affairs.
- **Association Agreements (Section 44)** Where formal agreements exist between members, these must be honoured. They serve as internal governance compacts and clarify expectations.
- **Financial responsibility** Members are responsible for maintaining accurate records, ensuring tax compliance, and safeguarding the financial integrity of the corporation.
- **Confidentiality and fair dealing** Members must protect sensitive information and treat one another – and the corporation – with fairness and respect.

These duties are not abstract. They carry legal weight and personal liability, particularly in cases of negligence, misconduct, or breach of fiduciary obligation.

## 3. Stewardship in practice

While CCs may lack formal board structures, the principles of stewardship apply with equal force. Stewardship in a CC context means:

- **Thinking beyond compliance:** Managing not just to meet legal obligations, but to preserve the long-term health, reputation, and resilience of the enterprise.
- **Balancing short-term pressures with long-term purpose:** Making decisions that serve the enduring interests of the business and its stakeholders.
- **Fostering trust and transparency:** Creating a culture of accountability, ethical leadership, and shared commitment.

- **Navigating complexity:** Recognizing that CCs are social systems – subject to feedback loops, adaptation, and unintended consequences. Members who embrace stewardship are better equipped to lead through uncertainty, build enduring value, and avoid the pitfalls of reactive or transactional governance.

#### 4. Comparison: CC members vs company directors

<b>Aspect</b>	<b>CC Member</b>	<b>Company Director</b>
<b>Legal framework</b>	Close Corporations Act	Companies Act
<b>Role</b>	Owner-manager	Governance oversight
<b>Fiduciary duty</b>	Direct and personal	Codified and formal
<b>Decision-making</b>	Collective, often informal	Structured via board
<b>Liability</b>	Personal if negligent	Personal if reckless/fraudulent
<b>Stewardship mindset</b>	Embedded in daily management	Anchored in board governance

#### 5. Final note

This Primer is written primarily for company directors, but its principles are equally valuable for CC members. Stewardship is not a title, it's a position. Whether you are a founding member, a successor, or a prescribed officer in practice, you carry the responsibility to guide your enterprise with care, foresight, and integrity.

For further reading, we recommend *Stewardship in Practice: Beyond Compliance*, which explores how governance can become a generative force for resilience and value creation – regardless of legal structure.

# Appendix B: Non-profit companies

## LEGAL CONTEXT

**1.1** Consequently, the NPC must apply its assets and financial income solely for the approved cultural, social or communal or group activities; it may not distribute its assets or income to the benefit of the NPC’s members (or directors and officers), other than as fair remuneration, payment of services or rights or some other legal obligation binding the company. (See Sections 2 and 3 of Schedule 1 of the Act).

NPC with members	NPC without members
<ul style="list-style-type: none"> <li>• Required to hold additional AGM</li> <li>• Members may be given right to vote</li> <li>• Will be required to function with both directors and members</li> <li>• Provision for members must be included in the Mol</li> <li>• Could be a requirement to donors that they are members of the NPC before they provide funding</li> <li>• PCs can be members of an NPC</li> <li>• Must report to members</li> <li>• Better for larger organisations</li> </ul>	<ul style="list-style-type: none"> <li>• No additional AGMs required</li> <li>• No interference from members</li> <li>• May function with only three or more directors/incorporators</li> <li>• No requirement to make provision for the Members in the Mol</li> <li>• No provision made for members which could limit funding for donors</li> <li>• Functions only with a board with no requirement to report to members</li> <li>• Better for smaller organisations</li> </ul>

Members are those persons who hold membership and have rights specified in the company’s MoI.

**1.2** In NPCs with members, the directors are accountable to its members. By definition, in NPCs without members, the directors do not account to members, but may, presumably, be called to account by a court of law.

## COMPANIES ACT AND THE MOI

**2.1** A summary of South African Non-Profit law can be downloaded [here](#). Annex 1 provides extracts from the Companies Act No. 71 of 2008 (the Act) that are relevant to NPC directors and to the board as a whole.

**2.2** Section 10 and Schedule 1 provide the essential guide to directors on how the Act applies to NPCs. They also make it clear that the director of an NPC with members must substitute ‘shareholders’ and similar words or phrases with ‘members’.

The Companies and Intellectual Property Commission (CIPC) registers companies, keeps record of directors of companies, as well as those of the MoIs. All companies, including NPCs must submit annual filings and fees to CIPC.

- 2.3** There are standard short-form MoIs for companies that can be downloaded from CIPC's website. An NPC is not obliged to follow this; it may develop its own MoI but it must comply with the Act.

The MoI is a constitutional document that must not be confused with the constitution of a Voluntary Association, an organisation that operates under Common Law, not under the Companies Act. Furthermore, an NPC is managed by a board of directors, not a committee of the members. The BoD may, however, appoint an executive committee which is accountable to it and, in turn, the BoD is accountable to the members, assuming the NPC is incorporated with members.

Both voluntary associations and NPCs can be registered with the Department of Social Development (DSD) as non-profit organisations (NPOs) and, on successful application to the South African Revenue Service (SARS), may also become public benefit organisations (PBO) under income tax legislation. NPOs and PBOs are not legal entities; they are registrations with government, the DSD, and SARS respectively.

Voluntary associations cannot simply be converted to NPCs, nor vice versa, and retain NPO or PBO status. New entities need to be established and new registrations for NPO and PBO status need to be obtained. Transfer of assets and liabilities to the new entity needs to be carefully planned, preferably under appropriate professional guidance.

- 2.4** Many NPCs rely on the services by volunteers, who, by definition, are not employees. Therefore, they are not protected by the Basic Conditions of Employment Act. However, the Constitutional Court has ruled that the Labour Relations Act must be 'purposively construed in order to give effect to the Constitution'. Section 23(1) of the Constitution provides that 'everyone' has the right to fair labour practices. This includes volunteers, but there is no law that specifically deals with issues such as basic conditions and fair labour practice for volunteers.

It is beyond the scope of this document to elaborate on laws, policies and company rules on volunteers. Nevertheless, I suggest that an NPC's BoD should establish a policy and set of rules that address the issues of volunteers in their company. [Here](#) is a guide to volunteer policies and [here](#) is a volunteering handbook.

## GOVERNANCE CODES

- 2.5** The Independent Code of Governance for Non-profits is a statement of values, principles, and recommended practices, to 'which all non-profit organisations (NPOs) in South Africa are invited and encouraged to subscribe'. The code is not obligatory nor is it imposed by law. While NPCs may choose to subscribe to the Independent Code, the board of an NPC is obliged to abide by the laws that affect it and, specifically, to comply with the Companies Act.

Nevertheless, it is just not possible to legislate or codify the means to success. It is what the people in the NPC do within laws and codes that influences successful outcomes. The impact of the BoD on the success of a company is a function of its mix of knowledge, skill, experience, and expertise. In essence, the business and social acumen and practices of the BoD ... and luck.<sup>11</sup>

## ROLE OF THE BOARD OF DIRECTORS

- 3.** The object of an NPC relates to a social and/or cultural purpose, and this is closely linked to the notion of altruism: behaviour motivated by a desire to benefit someone other than oneself

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<sup>11</sup> Spyros Makridakis et al. *Dance with Chance . Making luck work for you.* Richmond; Oneworld, 2009

for that person's sake. While the NPC is so motivated, it is morally incumbent on the NPC to demonstrate no harm and to demonstrate a positive social impact. Intent and impact are not equivalent.