

Profit Growth Consultants

Director's Roles & Responsibilities (incl. King III summary)

Directors are bound by a distinct fiduciary duty to the company

- **“Fiduciary” is derived from the word “Trust”**
- **Directors owe a fiduciary duty to the company as a legal persona in its own right**
 - And not to the individual members of the company
 - Nor even if he is appointed on behalf of another person / group
 - The duty is held to the company and not the creditors, employees, or other stakeholders
 - This duty is an individual / personal duty
- **In this fiduciary capacity, a director assumes two roles:**
 - As an “agent” acting on behalf of the company
 - As a “trustee” who controls company assets

There are a range of circumstances where a director can be held personally liable by the stakeholders if he neglects his fiduciary duty.

The roles of a director are derived from their fiduciary duty

- **To act in good faith towards the company**
- **To act within their powers**
 - And use their powers only for purposes which benefit the organisation
 - By operating outside their powers, directors bind the company to the transaction and can be held personally liable if a loss results
- **Not to use for personal gain any information acquired in their capacity as a director**
 - There is a duty to disclose any personal interests as well as any information relating to the matter and known to the director; not take part in related decisions
- **To act in the best interests of the company**
 - And to avoid conflict between personal and company interests
 - A director may never prefer his own interests over that of the company
 - If serving on multiple boards, there is a separate duty to each company
- **To exercise independent judgement in decision making**
 - A director who is appointed to represent a particular interest group, is still obliged to act in the best interests of the company as a whole (even if these interest differ from the interest group)

There is a trend to tighten up on Directors who act outside of these roles (and this also means that directors no longer have narrow (functional) contributions to the board and company.)

There is a duty of care and skill for all directors

- **The degree of care and skills is determined objectively on an individual basis**
 - By considering how a reasonable person with similar knowledge and experience would have acted
 - Each case is considered individually taking into account the nature of the business and the director's specific obligations
- **There is no distinction between executive and non-executive directors**
- **Directors have to comply with a number of obligations in terms of the Companies Act**
- **The company's memorandum and articles of association provides the internal rules by which a company is governed**
 - The Companies Act provides a standard set of rules often used in the articles, but these can be amended for a company's specific needs
 - Each director should be familiar with these as they invariably impose duties on directors
- **There is a positive duty to disclose any material information to the board regarding any business or contract the company may be interested or involved in**

There is a new Companies Act that has been signed into law and comes into effect early in 2010 that has updated these duties

Limits of delegation, authority and powers

- **Whilst shareholders retain ultimate responsibility they delegate the day to day running to the directors, who in turn appoint and supervise management**
 - The board of directors must manage the company within the limits of legislation and the memorandum and articles
 - The board may delegate certain powers to managers and at the same time impose appropriate restrictions and conditions which can be waived or revoked at any time
- **The directors have a duty to monitor management's performance**
 - And ensure that management work within their delegated power
- **The directors are entitled to trust management when reaching their own decisions**
- **Generally the powers and duties of directors are left undefined and it is implied that directors possess all the powers necessary to enable them to direct the affairs of the company**

Directors (not shareholders) remain ultimately liable, both jointly as a board and individually, for the wellbeing of the company

Directors have rights to enable them to carry out their fiduciary duties

- To inspect the company's accounting records, assisted by an accountant
- To claim re-imbusement for expenses incurred
- To discharge their duties without interference from co-directors
- To participate in the strategic management of the company and attend and vote at board meetings
- To receive reasonable notice of meetings
- To take independent professional advice at the expense of the company

There are no excuses for directors not fulfilling their fiduciary duties.

Personal liability is a real risk to directors, but difficult to prove

- **A director can be held personally liable to the creditors if such person was knowingly party to the carrying on of the business of the company recklessly or with the intent to defraud creditors or for any fraudulent purpose**
- **“recklessly” requires at least gross negligence**
- **“party to” means that the director must have taken part in or concurs with the decision**
 - He may be deemed to be “party to” as a result of his duty of care and diligence
- **“knowingly” means that a director must have had knowledge of the facts from which a conclusion can properly be drawn**
 - The director does not need to have known of the consequences of the decisions as it is assumed the director can draw the necessary conclusions of their actions
- **The “business judgement rule” provides a director with a defence to a contravention of his statutory duties. A director will have fulfilled his duties is:**
 - He has taken reasonably diligent steps to become informed on the matter;
 - He had no material personal interest in the matter (or he disclosed an interest); and
 - He had a rational basis for believing and did believe that the decision taken was in the best interests of the company
- **A director is allowed to rely on the performance or information provided by third parties when making a decision, even if that turns out to be incorrect**

In the end it comes down to what did the director reasonably “believe” about the actions they were taking

Here are some key questions directors should be able to answer:

- **Am I complying with my common law and statutory duties?**
- **Are there any provisions in the memorandum or articles of association, which may impose additional duties on me?**
- **Is there any conflict between my own interests and those of the company?**
- **Am I sure that contracts I enter into on behalf of the company are within the scope of the memorandum and articles of association?**
- **Has the company taken out directors and officers liability insurance and am I sure I understand the conditions under which I am indemnified?**
- **Do I need to seek independent professional advice to enable me to better understand my role and duties as a director?**

King III codes of good corporate governance has been prepared because of the new Companies Act

- **Now applies to all entities including private companies**
- **Applied on a “comply or explain” basis**
 - I.e.: alternatives to the recommendations are allowed as long as they can be justified
 - Different from US “comply or else”
- **Includes recommendations for how directors should execute their responsibilities in terms of the duty of care, skill and diligence as well as their fiduciary duty**
- **Assumes the governance is stronger in the presence of “institutional investors” who have a vested interest in the market working**
- **The philosophy of the report revolves around leadership, sustainability and corporate citizenship**
- **Includes emerging governance trends such as alternate dispute resolution, risk based internal audit and board performance**

King III provides a set of best practices for board governance

The following are some of the principles that are recommended for the board responsibilities

- Provide effective leadership based on an ethical foundation
- Ensure that the company is and is seen to be a responsible corporate citizen
- Ensure that the company's ethics are managed effectively
- Act as a focal point for and custodian of corporate governance
- Appreciate that strategy, risk, performance and sustainability are inseparable
- Ensure that the company has an effective and independent audit committee
- Responsible for the governance of risk
- Responsible for the information technology and information security governance
- Ensure that the company complies with the applicable laws and considers adherence to non-binding rules, codes and standards
- Ensure that there is an effective risk-based internal audit

These principles are supported by a set of recommended practices and practice notes that should be followed.

The following are some of the principles that are recommended for the board responsibilities (cont 1)

- Appreciate that stakeholder perceptions affect the company's reputation
- Ensure the integrity of the company's integrated report
- Report on the effectiveness of the company's system of internal controls
- Act in the best interests of the company
- Consider business rescue proceedings or other turnaround mechanisms when in financial distress
- Elect a chairman who is an independent non-exec director. The CEO should not also fulfil the role of the chairman
- Appoint the CEO and establish a framework of delegation of authority
- The board should comprise a balance of power with a majority of non-executive directors. The majority of non-executive directors should be independent
- Directors should be appointed through a formal process

The following are some of the principles that are recommended for the board responsibilities (cont 2)

- The induction and ongoing training and development of directors should be conducted through formal processes
- The board should be assisted by a competent suitably qualified and experienced company secretary
- The evaluation of the board, its committees and the individual directors should be performed every year
- The board should delegate certain functions to well-structured committees but without abdicating its own responsibilities
- A governance framework should be agreed between the group and its subsidiary boards
- Companies should remunerate directors and executives fairly and responsibly
- Companies should disclose the remuneration of each individual director and certain senior executives
- Shareholders should approve the company's remuneration policy

King III goes on to provide more detailed principles and recommended practices for these aspect

- **Audit committee**
- **Governance of risk**
- **Governance of information technology**
- **Compliance with laws, rules, codes and standards**
- **Internal audit**
- **Governing stakeholder relationships**
- **Integrated reporting and disclosure**

Contact us for further assistance



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