Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises

CORPORATE LAW TOOLS PROJECT

JURISDICTION: SOUTH AFRICA

FIRM: EDWARD NATHAN SONNENBERGS (ENS)

DATE: MAY 2010

This report was submitted to the SRSG as part of his corporate law tools project, as explained in his press release of 23 March 2009: http://www.reports-and-materials.org/Corporate-law-firms-advise-Ruggie-23-Mar-2009.pdf. It is the sole work of ENS and does not necessarily represent the SRSG’s views. The SRSG is grateful to ENS for providing this report and for participating in the corporate law tools project.

If you have any questions about this report, please contact Professor Michael Katz, Senior Partner at ENS, at mkatz@ens.co.za. If you have questions more generally about the corporate law tools project, please contact Vanessa Zimmerman, (Legal Advisor to the SRS), at vanessa_zimmerman@hks.harvard.edu.
This report forms part of a project on corporate law and human rights under my mandate as Special Representative of the UN Secretary-General on Business and Human Rights: the “Corporate Law Tools Project”. I am delighted that nineteen leading corporate law firms from around the world are participating in the project, and thank them for their engagement. The willingness of so many firms to provide their services pro bono in order to expand the common knowledge base indicates that corporate law firms worldwide appreciate that human rights are relevant to their clients’ needs.

It is important at the outset to understand how this project fits into my wider work. I was appointed in 2005 by then UN Secretary-General Kofi Annan with a broad mandate to identify and clarify standards of corporate responsibility and accountability regarding human rights, including the role of states. In June 2008, after extensive global consultation with business, governments and civil society, I proposed a policy framework for managing business and human rights challenges to the United Nations Human Rights Council (Council). The Framework of “Protect, Respect, Remedy” rests on three differentiated yet complementary pillars: the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access for victims to effective remedy, judicial and non-judicial. You can read more about the Framework in my 2008, 2009 and 2010 reports to the Human Rights Council, available at my website: http://www.business-humanrights.org/SpecialRepPortal/Home.

The Council unanimously welcomed the Framework and extended my mandate by another three years, tasking me with “operationalizing” the Framework—that is, to provide “practical recommendations” and “concrete guidance” to states, businesses and others on the Framework’s implementation. There has already been considerable uptake of the Framework by all relevant stakeholders. It has also enjoyed unanimous backing in the Council; strong endorsements by international business associations and individual companies; and positive statements from civil society.

A key aspect of the first pillar, the state duty to protect, is that states should foster corporate cultures respectful of rights both at home and abroad, through all available avenues. In particular, I have been exploring the opportunities and challenges that corporate and securities law can provide in this regard. Corporate law directly shapes what companies do and how they do it. Yet its implications for human rights remain poorly understood. The two have often been viewed as distinct legal and policy spheres, populated by different communities of practice.

The Corporate Law Tools Project will allow me to explore this area further by mapping in over 40 jurisdictions how national laws and policies dealing with incorporation and listing; directors’ duties; reporting; stakeholder engagement; and corporate governance more generally currently require, facilitate or discourage companies from respecting human rights. I have asked the firms to explore not only what laws currently exist, but also how corporate regulators and courts apply the law to require or facilitate consideration by companies of their human rights impacts and preventative or remedial action where appropriate.

The project thus formally comprises part of my work on the state duty to protect. It will assist me to understand whether and how national corporate law principles and practices currently encourage companies to foster corporate cultures respectful of human rights. I will in turn consider what, if any, policy recommendations to make to states in this area, following consultation with all relevant stakeholders. However it is just one element of my work on the state duty to protect, which also looks at other areas of the law and national policies which might help states to encourage companies to respect human rights.
The project will also support my work on the corporate responsibility to respect and access to effective remedy. In relation to the responsibility to respect, I have explained that in addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. To discharge the responsibility, I have recommended that companies conduct ongoing human rights due diligence whereby they become aware of, prevent, and address adverse human rights impacts. The responsibility exists even where national laws are absent or not enforced because respecting rights is the very foundation of a company’s social license to operate. It is recognized as such by virtually every voluntary business initiative, including the UN Global Compact, and soft law instruments such as the International Labour Organization Tripartite Declaration and the OECD Guidelines on Multinational Enterprises. Nevertheless, an understanding of national laws, including corporate law, remains vital to ensure companies understand and comply with their national legal obligations. Moreover, as my 2010 report to the Council highlights, companies may face non-compliance with corporate and securities laws where they fail to adequately assess and aggregate stakeholder-related risks, including human rights risks, and may thus be less likely to effectively disclose and address them, as may be required.


In November 2009, York University’s Osgoode Hall Law School convened a multi-stakeholder consultation in Toronto in support of the Corporate Law Tools Project. The aim was to encourage a discussion of potential policy and legal reform in this area amongst practitioners, regulators, academics and civil society. A summary report from that meeting is available at: http://www.reports-and-materials.org/Corporate-law-tools-Toronto-meeting-report-5-6-Nov-2009.pdf.

An overarching trends paper will soon be available, bringing together the main themes from all of the firms’ reports. That paper as well as all reports will be available as completed at: http://www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools.

My thanks again to all participating firms.

John G. Ruggie
Special Representative of the UN Secretary-General on Business and Human Rights
Executive Summary

Setting the Legal Landscape/Regulatory Framework

The South African legal system is a hybrid system of common law and civil law, based on Roman-Dutch law and influenced by English law, subject to the Constitution.

The conduct of business in South Africa is regulated by national legislation applicable to all industries as well as national industry specific legislation (including legislation specifically geared towards social, political and environmental transformation ("Transformative Legislation")). By and large, the conduct of corporate business and the regulation of securities is governed by (i) the Companies Act 61 of 1973 (the "Companies Act"); (ii) the Close Corporations Act 69 of 1984 (the "Close Corporations Act"); (iii) the Securities Services Act 36 of 2004 (the "Securities Services Act") (which, inter alia, governs The Johannesburg Exchange Limited and the Bond Exchange of South Africa); (iv) common law company law principles as developed by case law; and (v) the King Report on Corporate Governance Principles for South Africa 2009 (the "King III Report") (adherence to which is voluntary, other than in the case of public listed companies).

The Companies Act and Close Corporations Act will be substituted with the New Companies Act 71 of 2008 (the "New Companies Act"). On 1 March 2010, the King III Report became effective. In contrast to the earlier versions of the King Report on Corporate Governance, the King III Report applies to all entities (as opposed to, as contemplated in earlier versions of the King Report, "affected entities" only), including pension funds.

The key government/Securities regulators are (i) the Minister of Trade and Industry; (ii) the Registrar of Companies; (iii) the Financial Reporting Standards Council; (iv) the Financial Services Board; (v) the Securities Regulation Panel; (vi) the Competition Commission; and (vii) the Exchange Control Department of the South African Reserve Bank.

Incorporation and Listing

Although subject to exceptions in limited circumstances, the concepts of limited liability and separate corporate personality are fundamental principles of South African law.

Directors’ Duties

South Africa recognises, at common law, the doctrine of enlightened shareholder value in terms of which directors are entitled to take cognizance of the interests of all stakeholders of a company subject to the interests of the shareholders. With the introduction of the Constitution and the King Reports on Corporate Governance, recognition is afforded to the broader impact of corporations on society. The JSE Socially Responsible Investment Index was launched in May 2004, following the second King Report on Corporate Governance.

In addition to their statutory duties under the Companies Act and specific legislation, directors, at common law, owe fiduciary duties to the company and a duty to take reasonable care, skill and diligence in the management of the company's affairs. Duties to avoid legal risk and damage to the company’s reputation are imposed on directors under the Companies Act, the New Companies Act and under the common law. In certain circumstances, personal civil and/or criminal liability is imposed on directors for the breach of such duties.

It is an absolute requirement that directors must act in the best interests of the company. Directors are permitted, however, to consider the company’s impacts on non-shareholders, provided that it is in the best interests of the company to do so. With the advent of Transformative Legislation, companies, and correspondingly their directors, are, in certain circumstances, required to consider the company’s impact on non-shareholders. Under the New Companies Act, it appears that directors are required to consider the company’s impacts on non-shareholders, subject, it is submitted by the authors, to the directors acting in the best interests of the company. The enlightened shareholder value doctrine is recognised at common law but is not regulated in the legislation dealing with companies.

There are various directors’ duties under the Companies Act, New Companies Act and the King Reports on Corporate Governance which encourage integrity, transparency and accountability and therefore, a corporate culture respectful of human rights. The enlightened shareholder value doctrine encourages a culture respectful of the promotion of values beyond simple profit maximisation.

South African corporate law does not recognise the two tier board structure and requires unitary boards.

Reporting

Companies are required to submit, at the annual general meeting, annual financial statements (and in the case of a holding company, group financial statements) verified by the board of directors of the company, which may be accessed by the company’s auditor. In terms of companies’ financial reporting obligations, companies are required to report on any fact or circumstance material to the state of affairs and financial position of the company. In terms of clause 4(v) of Schedule 4 of the Companies Act, the term “material” is defined as “anything that is significant in relation to the circumstances applicable to each company.” The materiality of the fact or circumstance is determined with reference to the impact which that fact or circumstance has on the financial position of the company. Non-financial reporting obligations are also imposed on companies. Moreover, the Constitution and the Promotion of Access to Information Act 2 of 2000 provides everyone with the right to access information held by another person in order to exercise or protect one's rights.
**Stakeholder engagement**

Under the Companies Act, a company has a duty to circulate a notice of any proposed resolution or statement to all members entitled to receive such notice. South African corporate law furthermore recognises that non-shareholders may address companies' annual general meetings.

**Other issues of corporate governance**

South African law has also addressed corporate governance issues by, inter alia, (i) ratifying a number of international conventions; (ii) providing for protection of the environment under the Constitution, and in various pieces of national legislation; (iii) giving employees direct rights of participation in the affairs of the company in various contexts; and (iv) ensuring gender and racial/ethnic representation on company boards under certain pieces of industry-specific Transformative Legislation.
Setting the legal landscape

1. Briefly explain the broader legal landscape regarding business and human rights.

1.1. The conduct of business in South Africa is regulated by legislation applicable to all industries as well as industry specific legislation. By and large, the conduct of corporate business and the regulation of securities is governed by the Companies Act 61 of 1973 (the “Companies Act”), the Close Corporations Act 69 of 1984 (the “Close Corporations Act”) and the Securities Services Act 36 of 2004 (the “Securities Services Act”). The Companies Act and Close Corporations Act will be substituted with the Companies Act 71 of 2008 (the “New Companies Act”), the purposes of which include, inter alia (i) promotion of compliance with the Bill of Rights as provided for in the Constitution, in the application of company law; (ii) encouraging transparency and corporate governance; (iii) reaffirming the concept of the company as a means of achieving economic and social benefits; (iv) providing for the creation and use of companies in a manner that enhances the economic welfare of South Africa; and (v) encouraging the efficient and responsible management of companies. Company law is also largely regulated by common law company law principles as developed by case law.

1.2. South Africa is a constitutional democracy. The Constitution of the Republic of South Africa (the “Constitution”) which came into force on 4 February 1997 (i) provides, inter alia, for the creation of a sovereign and democratic institutional state and a number of state institutions supporting constitutional democracy; and (ii) includes the Bill of Rights, which enshrines fundamental rights for the benefit of everyone.

1.3. Section 8(4) of the Constitution provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person. Moreover, in terms of section 8(2) of the Constitution -

“A provision of the Bill of Rights binds a natural and juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

1.4. Section 38 of the Constitution provides that any person can bring an action for the infringement or threatened infringement of any of their constitutionally enshrined rights.

1.5. All laws must accord with the provisions of the Constitution. Furthermore, in terms of section 39(2) of the Constitution, when interpreting any legislation, and when developing the common law or customary law, a court must promote the spirit, purport and objects of the Bill of Rights.

1.6. Sections 14, 23 and 39 of the Constitution regulate the role of international law and its application within South Africa. In terms of section 23 of the Constitution, any and all international agreements, once ratified by South Africa, become domestic law once they are enacted into the law of the Republic.

1.7. South Africa has signed and/or ratified, inter alia -

1.7.1. the international bill of human rights, comprising of (i) the Universal Declaration of Human Rights; (ii) the International Covenant on Civil and Political Rights; and (iii) the International Covenant on Economic, Social and Cultural Rights;

1.7.2. the Safety and Health in Mines Convention;

1.7.3. the Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour;

1.7.4. the Convention concerning equal remuneration for men and women workers for work of equal value;

---

1 The Companies Act 71 of 2008 was assented to on 8 April 2008, but a commencement date is yet to be proclaimed.

2 Section 7 of the New Companies Act.

3 Including the Public Protector, the Human Rights Commission and Auditor-General.

4 Section 36 of the Constitution contains a general limitation clause that applies to all rights in the Bill of Rights. In addition, there are other provisions in the Constitution that specifically limit rights in the Bill of Rights (IM Rautenbach and EFJ Malherbe Constitutional Law 5 ed (2009) p343).
1.7.5. the Convention concerning minimum age for admission to employment;
1.7.6. the Convention against Discrimination in Education;
1.7.7. the International Covenant on Economic, Social and Cultural Rights;
1.7.8. the International Covenant on Civil and Political Rights;
1.7.9. the International Convention on the Elimination of All Forms of Racial Discrimination; and
1.7.10. the International Labour Organisation Conventions.

1.8. Although such Conventions are aimed primarily at the state, the legislature must in turn legislate in the context of the relevant industries in order to give effect to the Conventions. South Africa has, for example, enacted the Labour Relations Act 66 of 1995 (the “LRA”), which contains a number of principles set out in the International Labour Organisation Conventions.

1.9. In addition, there are also a number of regional treaties which South Africa has ratified and, which assist in the improvement and augmentation of human rights duties, and sound corporate governance practice of states and corporations alike, namely (i) the African Charter on Human and Peoples’ Rights (1981) (which establishes the framework for the protection and promotion of human rights within the African region, as well as entrenching the right to a safe, healthy environment); (ii) the Treaty Establishing the African Economic Community (1991) (which promotes economic, social and cultural development, and the protection of the environment); and (iii) the Constitutive Act of the African Union (2000) (which promotes sustainable development and environmental protection).

1.10. Significant developments have followed the promulgation of the Constitution in South Africa, such as the promulgation of legislation specifically geared towards social, political and environmental transformation, including –

1.10.1. the LRA, which provides for economic development, social justice, labour peace and the democratisation of the workplace;
1.10.2. the Basic Conditions of Employment Act 75 of 1997 (the “BCEA”), which provides for the advancement of economic development and social justice by promoting fair labour practices;
1.10.3. the Employment Equity Act 55 of 1998 (the “EEA”), which provides for the achievement of equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination, and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups;
1.10.4. the National Environmental Management Act 107 of 1998 (“NEMA”), which provides for cooperative environmental governance;\(^5\)
1.10.5. the Mineral and Petroleum Resources and Development Act 28 of 2002 (the “MPRDA”), which provides for equitable access and sustainable development of mineral and petroleum resources;\(^6\)
1.10.6. the Securities Services Act, which regulates and controls securities trading and the administration of securities; and
1.10.7. the Broad-Based Black Economic Empowerment Act 53 of 2003 (the “BBBEA”), which promotes, inter alia, the constitutional right to equality, increases broad-based and effective participation of black people in the economy, increased employment and more equitable income distribution;

\(^5\) Section 24 of the Constitution entrenches the right to a sound environment (an environment “not harmful to the health or well-being” of any citizen) as well as the corresponding duty to protect the environment for future generations, and the preservation of the environment through reasonable legislation to prevent pollution and ecological degradation. Section 24 of the Constitution therefore encourages corporate entities to be mindful of their impact on a particular environment and ecosystem, and the people within that environment.

\(^6\) Section 37 of the MPRDA provides that –

“any prospecting or mining operation must be conducted in accordance with generally accepted principles of sustainable development by integrating social, economic and environmental factors into the planning and implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations.”
(generally, “Transformative Legislation”).

1.11. In contrast to the King I Report on Corporate Governance for South Africa (the “King I Report”)
7 and the King II Report on Corporate Governance of South Africa (the “King II Report”),
8 the King III Report applies to all entities as opposed to affected companies only.
9 The effective date of the King III Report was 1 March 2010. All entities who volunteer to adhere to the King III Report are expected to consider impacts on non-shareholders.

1.12. Adherence to the King I Report, the King II Report and the King III Report, (collectively, the “King Reports”) is voluntary. Companies are therefore not expected to abide by their provisions unless they voluntarily undertake to do so or unless they are listed on the Johannesburg Securities Exchange Limited (the “JSE”).

1.13. Section 8.63(a) of the JSE Limited Listings Requirements (the “Listings Requirements”) requires public listed companies, to disclose, in their annual reports and annual financial statements, their measure of compliance with the King Code, which is defined in the Listings Requirements as “the Code of Corporate Practices and Conduct representing the principles of good governance as laid out in the King Report as amended or replaced from time to time” (the “King Code”).

1.14. Section 3.84 of the Listings Requirements (Corporate Governance) provides that, in addition to complying with section 8.63(a) of the Listings Requirements, listed companies must also comply with a number of specifically itemised corporate governance requirements, and must disclose their compliance therewith in their annual report (see paragraph 16.7 below).

1.15. By virtue of the fact that listed companies are required to comply with such specifically itemised corporate governance requirements, certain consequences follow where a listed company does not comply. In terms of section 1 of the Listings Requirements, the JSE has the power, subject to the Listings Requirements, to grant, review, suspend or terminate a listing of securities or impose a fine on a listed company. Therefore, in the event that a listed company does not comply with such specifically itemised corporate governance requirements, the JSE would have the power to suspend or terminate such company’s listing of its securities or impose a fine on such listed company.

Regulatory Framework

2. To what legal tradition does the jurisdiction belong, i.e. civil/common law, mixed

The South African legal system is a hybrid system of common law and civil law, based on Roman-Dutch law and influenced by English law, and subject to the Constitution.10 The degree of influence differs depending on the area of law. In corporate and commercial law, a pronounced English law influence is apparent.11

3. Are corporate / securities laws regulated federally, provincially or both?

Corporate/securities laws are regulated on a national level. The principal pieces of legislation are (i) the Companies Act and the Close Corporations Act, which regulate companies and close corporations,12 respectively and which will be substituted by the New Companies Act (see paragraph 1.1); and (ii) the Securities Services Act, which regulates securities, including the buying and selling of securities and market abuse.

4. Who are the government corporate/securities regulators and what are their respective powers?

4.1. Broadly, the key government/securities regulators are –

7 In November 1994, the King I Report was published by a committee headed by Judge Mervyn King and issued by the Institute of Directors, Southern Africa.

8 In March 2002 the King II Report was published, which substituted the King I Report.

9 Chapter 13 of the King III Report, p16.

10 See paragraph 1.


12 A close corporation is a form of business entity that is simpler, less expensive and more flexible than a company, and is intended for small enterprises consisting of a single or small number of participants. The close corporation was introduced into South Africa as part of the process of economic, social, political and legal reform, to facilitate the development of small businesses.
4.1.1. the Minister of Trade and Industry (the “Minister”);

4.1.2. the Registrar of Companies, who is appointed by the Minister and is responsible, subject to the directions of the Minister, for the administration of the Companies Registration Office;

4.1.3. the Financial Reporting Standards Council (established in terms of section 440P of the Companies Act) (the “FRSC”), which (i) is tasked with establishing uniform financial reporting standards for companies; and (ii) under the New Companies Act, will assume the role of an advisory committee to the Minister and will “advise on regulations establishing financial reporting standards, which will govern the form, content and maintenance of companies' financial records and statements”;14

4.1.4. the Financial Services Board (established in terms of section 82 of the Securities Services Act) which (i) “oversees the South African Non-Banking Financial Services Industry” in the public interest; and (ii) administers and ensures compliance with the securities law in order to promote and improve the efficiency of financial institutions;15

4.1.5. the Securities Regulation Panel (established pursuant to Chapter XVA of the Companies Act) (the “Panel”), which –

4.1.5.1. is tasked with (i) supervising dealings in securities; and (ii) regulating all transactions or schemes which constitute “affected transactions” and schemes, and all proposals which on successful completion or implementation would be affected transactions, relating to any public company (irrespective of whether it is listed on the JSE) or private company with a value of more than R5 000 000.00 (five million rand) and having more than ten beneficial shareholders;16 and

4.1.5.2. following the promulgation of the New Companies Act will be substituted with the Takeover Regulation Panel, an independent organ of state, vested with the same powers and functions of the Panel;

4.1.6. the Competition Commission (established in terms of section 79 of the Competition Act 89 of 1998), which is responsible for the investigation, control and evaluation of restrictive business practices, abuse of dominant positions and mergers; and

4.1.7. the Exchange Control Department of the South African Reserve Bank, which administers and controls exchange control in South Africa.

4.2. There are also industry-specific regulators.

5. Does the jurisdiction have a stock exchange(s)?

5.1. The JSE, established in November 1887, is the only stock exchange in South Africa. Shares, equity instruments, as well as certain derivatives are traded on the JSE. Interest rate derivatives, bonds (including asset-backed securities) are traded on the Bond Exchange of South Africa (the “BESA”).

5.2. The JSE and the BESA are self-regulatory organisations, subject to the Securities Services Act.

Incorporation and listing

13 Section 7 of the Companies Act.

14 Sections 3-9 of the Memorandum on the Objects of the New Companies Act.


17 In terms of section 440 of the Companies Act, the term “affected transaction” means a transaction which is part of a series of transactions which, taking into account any securities held before such transaction, has or will have the effect of vesting control of any company in any person or two or more persons acting in concert in whom control did not vest prior to such transaction or which has the effect of such person or persons acquiring all the securities of that company, or all the securities of a particular class.

18 Provided that the Executive Director of the Securities Regulation Panel may exempt any particular transaction affecting a private company if it is satisfied that there can be no prejudice to minority shareholders.
6. **Do the concepts of “limited liability” and “separate legal personality” exist?**

6.1. The concept of separate corporate personality is a fundamental principle of South African law. In certain instances, however –

6.1.1. the legislature disregards the principles regarding the separate corporate personality of a company, for example, section 424 of the Companies Act provides that where it appears that any business of a Company was or is carried out recklessly or with intent to defraud, the court may declare that any person who was knowingly party to the carrying on of business in that manner is personally liable for any debts of such company; and

6.1.2. the courts are prepared to “pierce the corporate veil” to give effect to the reality behind a façade of a company or even to ignore the separate existence of the separate corporate personality of a company, for example, in Robinson v Randfontein Estates Gold Mining Co Ltd (1921 AD 168 at 194 to 195), the court refused to take into consideration the separate existence of a subsidiary where it was sought to use the subsidiary as a “device” to evade a director’s fiduciary duties to the holding company. 

Courts are reluctant, however, to pierce the corporate veil in the absence of fraud or quasi fraud.

6.2. The concept of limited liability is a fundamental principle of South African law. The Companies Act contains exceptions to this principle, however, for example, under -

6.2.1. section 53(b) of the Companies Act, the memorandum of a private company may provide that the directors and past directors of such company will be liable jointly and severally, together with such company, for such debts and liabilities of the company as are or were contracted during their periods of office, and in such a case, such directors and past directors will be so liable;

6.2.2. section 66 of the Companies Act, if any member of a company other than a wholly owned subsidiary carries on business for more than six months while it has less than seven members, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is so carrying on business, is liable for the payment of debts of such company contracted during such time; and

6.2.3. section 424 of the Companies Act (see paragraph 6.1.1).

6.3. The New Companies Act introduces a new action where, upon application brought by an interested party or the court acting mero motu (i.e. where the court acts of its own free will), the company is deemed not to be a juristic person (s163(4)). The court may declare that the company is not to be considered a juristic person where the incorporation of, or any act by or on behalf of, or any use of, that company constitutes an unconscionable abuse of the juristic personality of the company as a separate entity. The consequence of the court declaring that the company lacks juristic personality is that the company will cease to have a separate legal personality, and will cease to exist as an entity which is separate from its members and the members will be personally liable for any debts incurred by the company.

7. **Did incorporation or listing historically, or does it today, require any recognition of a duty to society, including respect for human rights?**

7.1. Incorporation is not conditional upon the recognition of a duty to society. In the Parliamentary Submission on the Companies Bill, the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (“SAIFAC”) proposed that the New Companies Act be amended to provide that companies must place in their memorandum of incorporation (which is the document which, once registered, results in the incorporation of a company) a provision which states that the company recognises that “it is bound by the rights in the Bill of Rights to the extent applicable to it.” Although one of the purposes of the New Companies Act is to promote compliance with the Bill of Rights in the application of company law, the aforesaid proposal advanced by SAIFAC has not been incorporated into the New Companies Act.

7.2. In respect of the listing of companies on the JSE, as set out in paragraph 1.13 above, listed companies are required to adhere to specifically itemised corporate governance principles, and are required to disclose their measure of compliance with the King Code. In addition, section 4.1 of the Listing Requirements provides that a listing will be granted to a company subject to its compliance with the Listings Requirements and approval by the JSE. Therefore, in the event that a company wishes to list on the JSE, such company would be

---


required to comply with the Listing Requirements, including those which contain specifically itemised
corporate governance principles.

8. **Do any stock exchanges have a responsible investment index, and is participation voluntary?** (See e.g. the
Johannesburg Stock Exchange’s Socially Responsible Investment Index.)

8.1. In May 2004, pursuant to the King II Report, the JSE Socially Responsible Investment Index (the “Index”)
was launched, whereby the JSE assesses, on the FTSE/JSE All Share Index, the social and environmental
impact of companies, as well as their economic performance.

8.2. Public listed companies who wish to feature on the Index are required to meet the minimum core and
desirable indicators as set out in criteria developed by the JSE, based on The United Nations Principles for
Responsible Investment.\(^{21}\)

8.3. Participation on the Index is voluntary, and, as at 29 April 2010, there are 72 (seventy two) companies listed
on the Index.

**Directors’ Duties**

9. **To whom are directors’ duties generally owed?**

9.1. In addition to their statutory duties under (i) the Companies Act; (ii) specific legislation in the areas of
environmental law, tax law and social security laws,\(^{22}\) directors, at common law owe –

9.1.1. fiduciary duties to the company, which duties are therefore primarily protective of the company
and its shareholders as a whole; and

9.1.2. a duty, to the company, to take reasonable care, skill and diligence in the management of the
company’s affairs.

9.2. The codification of director’s duties in the New Companies Act effectively preserves the common law duties.

9.3. It should also be noted that criminal liability, and thus a duty to the State, can also arise (i) under the
Companies Act, where it is commonly used to encourage directors to ensure that the company complies with
formalities; (ii) under various statutes; and (iii) through the common law principles of accessory criminal
liability.\(^{23}\)

10. **Are there duties to avoid legal risk and damage to the company’s reputation? If so, are they duties in their
own right or are they incorporated into other duties?**

10.1. Section 424 of the Companies Act will apply in circumstances where legal risk or damage to a company’s
reputation arises out of reckless or fraudulent conduct of the company’s business. Under section 424 of the
Companies Act, personal liability is imposed on directors for carrying on the business of the company
recklessly or with intent to defraud creditors of the company or creditors of any other person or for any
fraudulent purpose. In addition, at common law, directors may not incur debts unless there is a reasonable
expectation that the company will be able to discharge the debts on due date.

10.2. Similarly, section 77(3)(c) of the New Companies Act provides that a director of a company will be liable for
any loss, damages or costs sustained by the company as a result of the director having been a party to an
act or omission by the company despite knowing that the act or omission was calculated to defraud, *inter
alia*, a creditor.

10.3. Furthermore, directors’ duties to avoid legal risk and damage to their company’s reputation are part of the
duties owed by directors to the company to take reasonable care, skill and diligence in the management of the
company’s affairs, as well as in terms of general delictual principles.

10.4. Section 76 of the New Companies Act prescribes certain duties of directors which include, but do not
constitute an exhaustive list of, the duties of directors at common law (the “Prescribed Duties”). The
Prescribed Duties will exist in conjunction with the common law duties of directors and these include the duty


\(^{23}\) Ibid.
of a director not to use his position as director, or any information obtained while acting in the capacity as a
director, to knowingly cause harm to the company or a subsidiary of the company.

10.5. Although, subject to what is set out in paragraphs 1.13, 1.14 and 1.15, adherence to the King III Report is voluntary, a company may potentially suffer harm to its reputation should it fail to observe the principles of corporate governance enshrined therein.

10.6. Directors must exercise their powers bona fide and for the benefit of the company. In doing so, directors must exercise the required degree of care and skill (as set out in paragraph 9.1.2). According to the King III Report, the more established certain governance practices become, the more likely a court would regard conduct that conforms with these practices as meeting the required standard of care, and any failure to meet a recognised standard of governance may render a board or individual director liable at law.

11. More generally, are directors required or permitted to consider the company's impacts on non-shareholders, including human rights impacts on the individuals and communities affected by the company’s operations? Is the answer the same where the impacts occur outside the jurisdiction? Can or must directors consider such impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction? (See e.g. s 172 UK Companies Act).

11.1. For the reasons set out in paragraphs 11.3 to 11.7 below, directors are permitted to consider the company’s impacts on non-shareholders, provided that in doing so, the directors act in the best interests of the company.

11.2. South Africa recognises, at common law, the doctrine of enlightened shareholder value, in terms of which directors are entitled to take cognisance of the interests of all stakeholders of a company including employees, the community, the environment, consumers and so forth, subject only to any such action promoting the interests of the primary stakeholders i.e. shareholders.

11.3. With the advent of –

11.3.1. Transformative Legislation (see paragraph 1.10), companies, and correspondingly their directors, are, in certain circumstances, required to consider the company’s impact on non-shareholders, including human rights impacts; and

11.3.2. the King III Report, an inclusive approach is considered fundamental to conducting business in South Africa in order to achieve a balance between economic efficiency and the broader objectives of society.

11.4. Directors of companies who volunteer to adhere to the King III Report, and listed companies which are required to report on their degree of compliance, as set out in paragraph 1.13 above, are expected to consider the company’s impacts on non-shareholders, and on communities and environments affected by company operations, provided that in doing so, the directors act in the best interests of the company. In this regard -

11.4.1. the board of directors is tasked with ensuring that the company guarantees the sustainability of its social and natural environments; and

11.4.2. the board of directors is expected to uphold a culture of ethical corporate conduct within the company, and to ensure that all company endeavours and projects are ethically sound and that “the company’s ethics are managed effectively”; and

11.4.3. the doctrine of the triple bottom line or the “triple context” is espoused, in terms of which the overall performance and value of a company must be assessed by looking at its economic, social and environmental impact and performance.

---

24 Op cit n19 p147.


26 For example, see section 37 of the MPRDA referred to in fn 6 above.


28 Principle 2.5 of the King III Report p22.

29 Chapter 9 of the King III Report p11.
11.5. The Companies Act does not contain provisions analogous to section 172 of the UK Companies Act 2006, in terms of which a director of a company must act in a manner which is most likely to promote the success of the company for the benefit of its members as a whole, and in so doing must have regard to, *inter alia*, (i) the likely consequences of any decision in the long term; (ii) the interests of the company's employees; (iii) the need to foster the company's business relationships with suppliers, customers and others; (iv) the impact of the company's operations on the community and the environment; (v) the desirability of the company maintaining a reputation for high standards of business conduct; and (vi) the need to act fairly as between members of the company.

11.6. As set out in paragraph 1.1 above, section 7 of the New Companies Act sets out its purposes, which include, *inter alia*, promotion of compliance with the Bill of Rights as provided for in the Constitution, in the application of company law. Under South African law, the rules of statutory interpretation provide that specific provisions of a statute must be read and reconciled with interpretative guidelines such as, for example, statements of the objects of an Act or provisions relating to the application of the Act, contained in the body of a statute. Section 76 of the New Companies Act (see paragraph 10.4) must therefore be read and reconciled with section 7 of the New Companies Act. Therefore, although the Companies Act does not contain provisions analogous to section 172 of the UK Companies Act 2006, section 7 of the New Companies Act read together with section 76 of the New Companies Act appears to indicate that directors are required to consider the company's impacts on non-shareholders, which includes, *inter alia*, ensuring compliance with the Bill of Rights in the application of company law. Such consideration is subject, it is submitted by the authors, to the directors acting in the best interests of the company.

11.7. The Companies Act applies to every company incorporated under it, including subsidiary companies, and to every external company, irrespective of where its impacts are felt. An "external company" is a company or other association of persons incorporated outside the Republic of South Africa, the memorandum of which was lodged with the Registrar of Companies under the repealed Companies Act 46 of 1926, or which, since the commencement of the current Companies Act, has established a place of business in the Republic of South Africa. It appears as though the intention of the legislature is that the Companies Act will apply to a company incorporated outside of the Republic of South Africa as soon as it establishes a place of business in the Republic of South Africa.  

12. If directors are required or permitted to consider the company's impacts on non-shareholders to what extent do they have a discretion in determining how to do so?

12.1. It is an absolute requirement that directors must act in the best interests of the company. Where it is in the best interests of the company to consider the company's impact on non-shareholders, then the directors are required to do so. In determining whether an act is in the best interests of the company, the directors must exercise an unfettered discretion. The directors must therefore determine, in an objective manner, whether an act is in the best interests of the company.

12.2. In light of the fact that the rules of statutory interpretation provide that specific provisions of a statute must be read and reconciled with interpretative guidelines contained in the body of a statute, the fact that the "Purposes of the Act" are contained in the body of the New Companies Act (i.e. in section 7 of the New Companies Act), makes it "hard to deny them legal efficacy". It therefore appears as though, notwithstanding the fact that the directors of a company must act in the best interests of the company, and although this principle is paramount, directors are required to take into consideration, the principles contained in section 7 of the New Companies Act.

12.3. Under certain pieces of Transformative Legislation, directors are required to consider the company's impacts on non-shareholders. For example, under the EEA, every employer "must take steps" (the emphasis is added) to ensure that there is equal opportunity in the workplace.

---

30 R v. Milne and Erleigh (7) 1951 (1) SA 791 (A) at 827; Lipschitz and Another; NNO v Landmark Consolidated (Pty) Ltd 1979 (2) SA 482 (W) at 488.


32 MS Blackman 'Companies Part I' *Law of South Africa* Volume 4(1).

33 Op cit n21 p145.

34 Ibid.

35 Op cit n31.

36 Section 5 of the EEA.
12.4. In light of the fact that (i) companies who voluntarily undertake to abide by the provisions of the King III Report; and (ii) companies listed on the JSE, are expected to abide by the King III Report, the directors of companies who voluntarily undertake to abide by the King III Report and the directors of companies listed on the JSE are required to consider the company’s impact on non-shareholders. In respect of companies which are not listed on the JSE and/or which do not voluntarily undertake to abide by the provisions of the King III Report, however, the general principle espoused in paragraph 12.1 is applicable, namely that directors must always act in the best interests of the company.

13. What are the legal consequences for failing to fulfil any duties described above; and who may take action to initiate them? What defences are available?

13.1. Under the Companies Act, various statutes, the common law, and New Companies Act, a number of consequences flow from the directors’ failure to meet or fulfil their duties to the company.

13.2. Under the Companies Act and various statutes, where a director breaches the section(s) which contain directors’ duties, such director will, by and large, incur civil and/or criminal liability. Under the common law, (i) where a director breaches his/her fiduciary duties toward the company, such director will be liable for loss arising from such breach; (ii) where a director breaches his/her duty to the company to take reasonable care and skill in the management of the company’s affairs, such director will incur delictual liability; and (iii) where a director is guilty of an offence, such director may incur criminal liability under the common law principles of accessory criminal liability. Enforcement of these duties is by means of a derivative action either at common law or in terms of the Companies Act. The New Companies Act abolishes the common law derivative action and makes the statutory derivative action exhaustive.

13.3. Under the Companies Act and the common law, the derivative action may only be instituted by shareholders. Under section 165 of the New Companies Act, the derivative action may be brought by (i) a shareholder or a person entitled to be registered as a shareholder of the company or of a related company; (ii) a director or prescribed officer of the company or of a related company; (iii) a registered trade union that represents employees of the company, or another representative of employees of the company; and (iv) a person who has been granted leave of the court, which may be granted only if the court is satisfied that it is necessary or expedient to grant such leave to protect a legal right of such person. It is submitted by the authors that the reference to the words “legal right” in section 165 of the New Companies Act would include a constitutional right, and accordingly, the court would grant leave to a person to protect a constitutional right under section 165 of the New Companies Act.

14. Are there any other directors’ duties which might encourage a corporate culture respectful of human rights?

14.1. Duties which encourage integrity, transparency and accountability encourage a corporate culture respectful of human rights, as these ensure that actions are explained, thereby promoting a culture of justification, which is a fundamental aspect of a constitutional democracy.

14.2. There are various directors’ duties which encourage integrity, transparency and accountability. For example, directors have a duty to ensure that all company profits are detailed and accounted for, thereby ensuring accountability. Directors have a duty to exercise an independent and unfettered discretion, which encourages a culture of integrity. Moreover, directors also have a duty to disclose any interests they may have in a contract with a company, thereby encouraging transparency.

14.3. The King III Report provides that boards of directors should recognise that companies do not act independently from the societies in which they operate, and that corporate actions must be compatible with societal objectives concerning social cohesion, individual welfare and equal opportunities for all. The King III Report does not, however, specify what the board of directors must do in order to ensure that corporate actions are compatible with such societal objectives.

14.4. Under the King III Report, the board of directors has a number of duties which encourage a corporate culture respectful of human rights, including that the board and its directors should (i) ensure that the company acts

---


38 Du Plessis NO v Phelps 1995 (4) SA 165 (C) at 170; Fisheries Development Corporation of SA Ltd v Jorgensen 1980 (4) SA 156 (W) at 166; Re Brazilian Rubber Plantations and Estates Ltd [1911] 1 Ch 425 (CA) at 437; Re D’Jan of London Ltd Copp v D’Jan 1994 1 BCLC 561.

39 Section 77 of the New Companies Act.


41 Only the shareholders in general meeting can sanction a contract in which a director has disclosed an interest.
as, and is seen to be, a responsible corporate citizen; (ii) cultivate and promote an ethical corporate culture; (iii) consider sustainability as a business opportunity; (iv) ensure the integrity of financial reporting; and (v) ensure that the company implements an effective compliance framework and effective processes.42

14.5. One of the founding principles of the King III Report and its predecessors is transparency.

14.6. As set out above, the enlightened shareholder value doctrine encourages a culture respectful of the promotion of values beyond simple profit maximisation.

15. For all of the above, does the law provide guidance about the role of supervisory boards in cases of two tier board structures, as well as that of senior management?

15.1. South African corporate law does not recognise the two tier board structure and requires unitary boards. A distinction is drawn, however, between executive directors and non-executive directors.

15.2. The King III Report states that a unitary board structure or one-tier directorship should be employed in South Africa over the two tier board structure, as full control of the company should vest in the board of directors.43 Furthermore, the board should consist of both executive and non-executive directors, with a majority of non-executive directors, to ensure objective decision-making.44

15.3. Under the King III Report, a number of board committees are also catered for, with supervisory functions over particular areas, namely (i) the audit committee; (ii) the risk committee; (iii) the nomination committee; and (iv) the remuneration committee. The function of the remuneration committee is to assist the board in setting and administering remuneration policies for all levels in the company, but should be especially concerned with the remuneration of senior executives.45 The risk committee is primarily tasked with (i) reviewing the risk management progress and maturity of the company; (ii) the effectiveness of risk management activities; (iii) the key risks facing the company; and (iv) the responses to address these key risks. The board may either appoint a risk committee to assist it in the discharge of its duties and responsibilities in respect of risk management or may assign this responsibility to the audit committee.46

15.4. It must be observed, that although there is this division of committees within the company, in terms of the King III Report, to whom the board of directors are encouraged to delegate responsibilities, the board of directors cannot wholly abdicate its responsibilities.47 Therefore ultimate responsibility and liability, as well as the supreme oversight function, vests with the board of directors.

15.5. Pursuant to section 72 of the New Companies Act, a company board may appoint committees comprised of directors, and “delegate to any committee any of the authority of the board”. These committees can therefore be understood as serving a de facto supervisory role in relation to any company actions taken with regard to that particular function.

15.6. In terms of section 72(4) of the New Companies Act, the Minister may order, where it is in the public interest to do so, having regard to the company’s annual turnover, the size of its workforce and the nature and extent of its activities, that “a company or a category of companies must have a social and ethics committee”.48 The New Companies Act has not become effective, and thus no such orders have been made by the Minister under section 72(4) of the New Companies Act.

---

42 Principles 2.1 – 2.27 of the King III Report p21-31.
43 Principle 1.1 of the King III Report p10.
44 Principle 2.18 of the King III Report p25.
45 Principle 2.2.5 of the King III Report.
46 Principle 2.23 of the King III Report, p28-29.
48 Section 72(4) of the New Companies Act.
16. Are companies required or permitted to disclose the impacts of their operations (including human rights impacts) on non-shareholders, as well as any action taken or intended to address those impacts, whether as part of financial reporting obligations or a separate reporting regime?

16.1. Section 302 of the Companies Act provides that every member of a public and private company and all persons other than members or holders of debentures of the company who are entitled to receive notices of general meetings of the company, are entitled to receive a copy of the annual financial statements of the company.

16.2. Section 31 of the New Companies Act provides that "a person who holds or has a beneficial interest in any securities issued by a company" is entitled to receive a copy of the annual financial statements of the company.

16.3. In respect of companies' financial reporting obligations, companies are not, other than reporting on any fact or circumstance material to the state of affairs and financial position of the company, expected to report on impacts to non-shareholders, including human rights impacts. The materiality of the fact or circumstance is not determined with reference to the nature of the fact or circumstance (e.g. whether the fact or circumstance is in respect of human rights), but rather is determined with reference to the impact which such fact or circumstance has on the financial position of the company.

16.4. Non-financial reporting obligations, however, are imposed on companies, *inter alia*, by –

16.4.1. certain pieces of Transformative Legislation, for example, in terms of sub-sections 21 and 22 of the EEA, an employer must report to the Director-General of the Department of Labour the progress of the implementation of employment equity measures in accordance with the company’s employment equity plan (prepared pursuant to section 20 of the EEA);

16.4.2. certain pieces of industry specific Transformative Legislation, for example, section 21(b) of the MPRDA provides that the holder of a prospecting right must submit progress reports to the Regional Manager regarding the prospecting operations of such holder; and

16.4.3. industry charters, such as, for example, the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, which provides that companies must report on an annual basis their progress toward achieving their commitments to the objectives set out in the Charter. It should be noted in relation to industry charters, however, that organs of state and public entities are only bound by such charters once they are published or gazetted as a Sector Code, in terms of section 9(1) of the BBBEA. Until such time, a charter is merely voluntary, non-punitive and non-binding on the state and public entities. Moreover, companies in the private sphere are at no point bound by the industry charters or Sector Codes, and may merely elect to abide by their provisions.

16.5. Principle 9 of the King III Report outlines the reporting obligations of companies. The King III Report endorses the use of an integrated report, which provides that a company should engage in sustainability reporting, in terms of which the company provides an account of its economic, social and environmental impact. Integrated reporting means a holistic and integrated representation of the company’s performance in terms of both its finances and its sustainability. Companies listed on the JSE and companies which

---

49 Clause 4(v) of Schedule 4 of the Companies Act defines the term "material" as "anything that is significant in relation to the circumstances applicable to each company".

50 Clause 67 contained in Part III of Schedule 4 of the Companies Act.

51 Section 1 of the MPRDA defines the “Regional Manager” as “the officer designated by the Director-General...as regional manager for a specified region”.

52 Section 12 of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 provides that –

"The Minister must publish in the Gazette for general information and promote a transformation charter for a particular sector of the economy."


54 Chapter 9 of the King III Report p12.

55 Principle 9.1 of the King III Report.
volunteer to adhere to the King III Report are expected to engage in sustainability reporting on a frequent basis, and should determine the most effective mechanisms through which to report to stakeholders on sustainability of the company, such as, for example, meeting with stakeholders, distributing written reports, to stakeholders, and via the company’s website. The integrated report may be presented in one document or may encompass more than one document, however, such document(s) should be made available to stakeholders simultaneously, in the form of an integrated report.

16.6. In relation to sustainability reporting, the King Report III makes reference to the Global Reporting Initiative, the International Corporate Governance Network, the European Union Green Paper for Corporate Social Responsibility (CSR), and the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Companies. The King III Report, in terms of its integrated reporting approach, expects companies which adhere to the King III Report to be guided by human rights principles and ensure that they evaluate their ethics in order to address the company’s impact on the community and “environmental, social and governance issues.”

16.7. Moreover, as set out in paragraphs 1.13 and 1.14 above, the Listings Requirements require public listed companies to disclose, in their annual report and annual financial statements, their measure of compliance with the King Code and with a number of specifically itemised corporate governance requirements. Paragraph 3.84 of the Listings Requirements provides that issuers must comply with, and must disclose their compliance in their annual report with, the following specific corporate governance requirements (i) the company must have a policy detailing the procedures for appointments to the board; (ii) the company must have a policy evidencing a clear division of responsibilities at board level; (iii) the chief executive officer must not also hold the position of chairperson; (iv) all issuers must, in compliance with the King Code, appoint an audit committee and remuneration committee and if required, given the nature of their business and composition of their board, a risk committee and nomination committee; (v) a brief CV of each director standing for election or re-election at the annual general meeting (the “AGM”) should accompany the notice of the AGM contained in the annual report; (vi) the capacity of each director of the company must be categorized as either executive, non-executive or independent; and (vii) the audit committee must set the principles for recommending the use of the external auditors for non-audit services.

16.8. Furthermore, in South Africa, section 32(1)(b) of the Constitution provides that everyone has the right of access to information held by another person when such information is required for the exercise or protection of any rights. The Promotion of Access to Information Act 2 of 2000 (“PAIA”) was enacted to give effect to this right.

16.9. Section 50 of PAIA provides that a person requesting information must be given access to any record of a private body if that record is required for the exercise or protection of any rights. Section 1 of PAIA defines a “private body” as including, inter alia, “any existing juristic person”. In light of the fact that companies are juristic persons, companies are required to provide access to persons requesting information from a company to exercise or protect any rights, provided that such access falls within the parameters of PAIA. The use of the words “any rights” in section 50 of PAIA may be interpreted as including Constitutional rights, and accordingly, it is submitted by the authors that such section contemplates the protection of Constitutional rights.

17. Do reporting obligations extend to such impacts or actions outside the jurisdiction? to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

17.1. Section 286 of the Companies Act provides that the annual financial statements of a company must include, inter alia, an auditor’s report, as required by section 301 of the Companies Act. Section 301(1) of the Companies Act provides that the auditor shall report to the members of the company the results of the operations of a company and its subsidiaries. In circumstances where a subsidiary is sued, then, in the event that such litigation is material, its holding company is required to report such litigation to the holding company’s shareholders in its consolidated financial statements (see paragraph 16.3 in relation to the meaning of the term “materiality”). Where the operations of a company or its subsidiaries are felt outside of South Africa, the reporting obligations of the company would extend to such impacts.

17.2. A holding company is required to submit group annual financial statements, in addition to its own annual financial statements, at the annual general meeting. Under the Companies Act and the New Companies Act, such reporting obligations relate exclusively to the financial statements of the companies.

56 King III Report, p12.

57 For example, section 64(1)(a) of PAIA provides that the head of a private body is required to refuse a request for access to a record of the private body if the record contains a third party’s trade secrets.

56 Op cit n52.

17.3. In terms of the King III Report, every company should have an effective and independent audit committee, which ensures integrated reporting (see paragraph 16.5) and financial controls. Furthermore, principle 3.1 of the King III Report provides that the shareholders of a public company and a state-owned company must elect the members of an audit committee at each annual general meeting. The King III Report provides further that this does not apply where a company is a subsidiary company of another company that has an audit committee and the audit committee of the holding company will perform the functions of an audit committee on behalf of that subsidiary.

17.4. In the section relating specifically to sustainability reporting, the King III Report makes no direct reference to the impacts of subsidiaries or impacts of companies overseas on non-shareholders. Principle 2.24 of the King III Report, however, expressly states that “[a] governance framework should be agreed between the group and its subsidiary boards”. Therefore, it could be inferred that a subsidiary would be guided by the same governance framework, and reporting structure, as its holding company, and therefore if the holding company adheres to the King III Report, and reports on its impacts on non-shareholders, then it may be that the subsidiary company is also expected to do so. In terms of the King III Report, a subsidiary company which voluntarily adheres to the King III Report is also expected to state its level of compliance with the policies of the holding company within the subsidiary’s integrated report.\(^{51}\)

17.5. Principle 2.24.3 of the King III Report provides that should the board of the subsidiary company approve the adoption and implementation of the policies and procedures of the holding company, such approval should be disclosed by the subsidiary company in its integrated report.\(^{52}\)

18. **Who must verify these reports; who can access reports; and what are the legal consequences of failing to report or misrepresentation?**

18.1. Section 299 of the Companies Act and section 30(5)(a) and (b) of the New Companies Act provides that the board of directors of the company must verify the annual financial statements of the company.

18.2. Section 300 of the Companies Act and section 93 of the New Companies Act provides that the auditor of a company can access the annual financial statements of a company, and can examine such financial statements.

18.3. Under the Companies Act (i) any director of a company who conceals, destroys, mutilates, falsifies or makes any false entry in or, with the intent to defraud or deceive, makes any erasure in any financial statement of the company shall be guilty of an offence;\(^{63}\) and (ii) if any financial report of a company is false or misleading in a material respect, any person who is a party to the preparation, approval, publication, issue or supply of that report and who knows or ought reasonably to suspect that it is false or misleading is guilty of an offence.\(^{64}\)

18.4. Under the New Companies Act, (i) a director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having signed, consented to, or authorised the publication of any financial statements that were false or misleading in a material respect;\(^{65}\) and (ii) a person is guilty of an offence if the person is party to the preparation, approval, dissemination or publication of any financial statements which are materially false or misleading.

18.5. Under the EEA, where a company fails to meet the reporting obligations imposed on it under sections 21\(^{66}\) and 22\(^{67}\) thereof, the company may incur a fine under section 50(1)(g) of the EEA.

\(^{60}\) Section 30(3) of the New Companies Act.

\(^{61}\) Principle 2.24.4 of the King III Report, “Disclosure should be made on the adoption of the holding company’s policies in the integrated report of the subsidiary company.”

\(^{62}\) Principle 2.24.3 of the King III Report, “Adopting and implementing policies and procedures of the holding company in the operations of the subsidiary company should be a matter for the board of the subsidiary company to consider and approve, if the subsidiary company’s board considers it appropriate. The subsidiary company should disclose this adoption and implementation in its integrated report.”

\(^{63}\) Section 250 of the Companies Act.

\(^{64}\) Section 287A of the Companies Act.

\(^{65}\) Section 77(3)(d)(i) of the New Companies Act.

\(^{66}\) Section 21 of the EEA provides that a designated employer (which is defined in section 1 of the EEA as (i) an employer who employs fifty or more employees; (ii) an employer who employs fewer than fifty employees, but has a total annual turnover equal to or above a turnover specified in the EEA; (iii) a municipality; (iv) an organ of state; or (v) an employer bound by a collective agreement) must report to the Director-General of the Department of Labour with certain prescribed information regarding its employees.
18.6. In terms of the King III Report, the independent audit committee ensures the integrity and accuracy of the integrated report, which is expected to be compiled by companies listed on the JSE and companies who volunteer to adhere to the King III Report (see paragraph 16.5).

18.7. The integrated report incorporates both the financial reporting and the sustainability reporting of a company. Principle 3.4 of the King III Report provides that the audit committee is tasked with overseeing integrated reporting. Further, principle 3.4 of the King III Report provides that the audit committee should (i) have regard to all factors and risks that may impact on the integrity of the integrated report; (ii) ensure review and comment on the financial statements included in the integrated report; (iii) review the disclosure of sustainability issues in the integrated report to ensure that it is reliable and does not conflict with the financial information; (iv) recommend to the board to engage an external assurance provider on material sustainability issues; (v) consider the need to issue interim results; (vi) review the content of the summarised information; and (vii) engage the external auditors to provide assurance on the summarised financial information.

18.8. Principle 2.1 of the King III Report provides that the board of directors of a company is “the focal point for and custodian of corporate governance”. Furthermore, Principle 2.12 of the King III Report provides that the board should also ensure the integrity of the company’s integrated report. Therefore, it may be inferred from the King III Report that the board has an oversight function and is tasked with ensuring that the company as a whole adheres to its corporate governance duties.

18.9. Principle 2.1 of the King III Report provides that the board of directors of a company is “the focal point for and custodian of corporate governance”. Furthermore, Principle 2.12 of the King III Report provides that the board should also ensure the integrity of the company’s integrated report. Therefore, it may be inferred from the King III Report that the board has an oversight function and is tasked with ensuring that the company as a whole adheres to its corporate governance duties.

18.10. In terms of the King III Report, the board must also, publish, along with the integrated report, summarised financial statements.

18.11. Section 90 of PAIA provides that a person who intentionally denies a person a right of access to information by (i) destroying, damaging or altering a record; (ii) concealing a record; or (iii) falsifying a record or making a false record, commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.

**Stakeholder engagement**

19. **Are there any restrictions on circulating shareholder proposals which deal with impacts on non-shareholders, including human rights impacts?**

19.1. Under South African company law, reference is made to the term “proposed resolutions” as opposed to the term “shareholder proposals”.

19.2. In terms of section 185 of the Companies Act, a company has a duty to circulate notice of any proposed resolution or statement, as well as a copy of the proposed resolution or statement to be tabled at any general meeting, to all members entitled to receive notice of that general meeting.

19.3. The general rule is that the content of the notice is delineated by the articles of association of the company. Restrictions on circulating shareholder proposals may therefore be included in the articles of association of a company. The Companies Act and the New Companies Act do not specify what information such notices must contain, nor do they specify any restrictions in relation thereto.

19.4. In the event that the articles of association of the company do not contain restrictions on circulating shareholder proposals, a company may be relieved of the obligation to circulate any resolution or statement, if on the application of the company or any other interested person, the court is satisfied that the right is being abused to secure needless publicity for defamatory matter.

---

67 Section 22 of the EEA provides that “Every designated employer that is a public company must publish a summary of a report required by section 21 in that employer’s annual financial report”.

68 Principle 3 of the King III Report, p31-35.

69 The independent audit committee “fulfils a vital role in corporate governance”. In particular, the audit committee ensures; (i) the integrity of integrated reporting and financial controls; (ii) the proper identification and management of financial risks; and (iii) the integrity of the reporting practices. See Principle 3 of the King III Report p32.

70 King III Report, p. 13.

71 See Principle 3.4 of the King III Report.


73 Section 185(5) of the Companies Act; *Merion Court Durban Ltd v Kidwell* 1976 (4) SA 584 (D).
Reference is made again to the doctrine of enlightened shareholder value, at common law, in terms of which directors are entitled to take cognizance of the interests of all stakeholders of a company subject to the best interests of the company.

Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions?

In South Africa, pension funds are considered private bodies.

In 2007 Pension Fund Circular 130 (the “PF Circular 130”) was published by the Registrar of Pension Funds (the “Registrar”). PF Circular 130 –

identifies the stakeholders in the governance of a fund as the fund’s members (including pensioners, former members and deferred pensioners); members’ dependents and/or nominees (as beneficiaries); the employer participating in the fund; the sponsor of the fund (if not the employer) and the Registrar; and

provides that every fund should have an investment policy statement ("IPS"), which must be communicated to stakeholders and reviewed annually. An IPS should reflect whether the fund has a socially responsible investment policy ("SRI"). SRI’s are increasingly advocated as necessary and appropriate in the investment choices that pension funds make.

Pension Fund Circulars are not legally binding or a form of subordinate legislation, but are issued as the Registrar’s guidance as to what constitutes good practice.

The King III Report, in contrast to the King I Report and II Report, applies to all entities (see paragraph 1.11), including pension funds, and therefore, in addition to PF Circular 130, the King III Report ensures the good governance of pension funds.

Not every principle will apply directly to each and every pension fund. The board of the trustees of a pension fund will have to consider the approach that best suits its size and complexity.

At common law, pension fund trustees have a duty to act with due care, diligence and good faith in their direction, control and overseeing of the operations of the fund. Moreover, section 7C of the Pension Funds Act 24 of 1956 provides that trustees must direct, control and oversee fund operations in accordance with applicable laws and rules of the fund and, in so doing, to take all reasonable steps to ensure that members’ interests are protected at all times. In addition, the Financial Institution (Protection of Funds) Act 28 of 2001 also requires trustees to observe utmost good faith and exercise proper care and diligence.

With the developments in the pension fund context in regard to good governance (in the form of PF Circular 130), pension funds who volunteer to adhere to the King III Report are expected or permitted to consider impacts on non-shareholders (stakeholders) of the fund in all investment decisions.

Can non-shareholders address companies’ annual general meetings?

At present, the articles of association of a company (the document governing the internal affairs of the company) set out the requirements in terms of the annual general meeting of the company, such as, for example, who can address the annual general meeting of the company. 74

The annual general meeting primarily serves as a forum for directors to impart information about the operations of the company, the company’s general well-being and its status, to the shareholders. In terms of sections 286 and 299 the Companies Act, the annual general meeting is held for four principle reasons namely, in order (i) to present the financial statements of the last financial year, to company members; (ii) for directors to deliver the directors’ report on the company’s financial performance, and the state of the company’s affairs; (iii) to allow members to scrutinize and directly question directors over their administration of the company during the course of the year under review; and (iv) to submit the auditor’s report (as part of the financial statements package delivered before the meeting) to company members, detailing the accounts of the company and the auditor’s accounting practices.

The New Companies Act appears to retain many of the provisions of the Companies Act in relation to the annual general meeting.

---

74 Section 179(2) of the Companies Act.
21.4. The articles of association of the company may provide that a non-shareholder (for example the auditor) may address the annual general meeting in order to impart information about the operations of the company, its company’s general well-being and its status clearly to shareholders. Generally, a non-shareholder will address an annual general meeting where it is invited to do so by the chairman of the company.

**Other issues of corporate governance**

22. Are there any other laws, policies, codes or guidelines related to corporate governance that might encourage companies to develop a corporate culture respectful of human rights, including through a human rights due diligence process?

22.1. As previously outlined (see paragraph 1.10.1), there are a number of pieces of Transformative Legislation in South Africa. Furthermore, the development of industry-specific charters for adoption by companies, pursuant to the BBBEA, also endorse an equitable, human rights-centric approach to business. These charters have as their genesis, the Constitution, particularly section 9 (the equality clause) of the Constitution, as their purpose is to address the issue of transformation within particular business sectors. Examples of these charters include the Mining Charter and the Construction Sector Charter. The charters make reference, in their preambles, to the rights enshrined in the Bill of Rights of the Constitution.

22.2. Furthermore, with the introduction of the King Reports, recognition is afforded to the broader impact of corporations on society.

22.3. As set out in paragraph 1.11, the King III Report applies to all entities. All entities who volunteer to adhere to the King III Report will be expected to consider impacts on non-shareholders.

23. Are there any laws requiring representation of particular constituencies (i.e. employees, representative of affected communities) on company boards?

23.1. Under South African law, employer-employee relations are highly regulated, by means of specific statutes, such as the LRA, the BCEA, and section 23 of the Constitution. These statutes, do not, however, require representation of particular constituencies (i.e. employees or representatives of affected communities) on company boards.

23.2. In terms of the New Companies Act, employees are given direct rights of participation in the affairs of the Company in various contexts. These would include significant participation in the new business rescue regime, locus standi to use the derivative action against delinquent directors and managers and other wrongdoers, the ability to interdict ultra vires conduct, whistleblower protection, entitlement to receive notice where directors wish to give financial assistance for the acquisition of shares in the company or its holding company and disclosure protections where the company offers shares to its employees.

24. Are there any laws requiring gender, racial/ethnic representation; or non-discrimination generally, on company boards?

24.1. Certain pieces of industry-specific Transformative Legislation contemplate gender, and racial/ethnic representation on company boards. For example, a number of the transformative industry charters, which are created by virtue of section 12 of the BBBEA make provision for the positioning of previously disadvantaged persons on company boards. For example, section 12 of the Financial Sector Charter issued in October 2003 provides that financial institutions should “undertake within the parameters of good corporate governance to promote increasing levels of influence of direct black owners at board level.” Therefore, an imperative is placed on financial institutions to ensure black representation or participation on company boards. The EEA, which applies to “Designated Groups”, defines the term “Designated Groups” as “black people, women, and people with disabilities”.

24.2. Furthermore, there are many pieces of Transformative Legislation which focus on gender equality and racial equality. For example, the Property Sector Charter on Black Economic Empowerment (Government Gazette No. 30333) aims to “enhance gender awareness in the workplace and promote a conducive and empowering environment for women in general” (the emphasis added). Although this charter does not specifically refer to the representation of women on company boards, by virtue of the fact that this charter envisages empowering women “in general” in the workplace, it may be interpreted as endorsing gender representation on company boards.

---

75 Although South Africa does not have a national corporate social responsibility policy, there is an extensive body of national legislation in South Africa geared towards social, political and environmental transformation.

76 GN 1248 of 5 October 2007: The Property Sector Charter on Black Economic Empowerment (Government Gazette No. 30333) states that the sector continues to reflect vast inequalities in representation of women in general, and black women in particular, in ownership, control, management and in skilled professions in the sector, and that transformation of the sector as a whole requires a specific focus on gender.
24.3. In addition, section 9(1) of the Constitution stipulates that neither the state nor any person may unfairly discriminate directly or indirectly against anyone on one or more grounds, including (i) race; (ii) gender; (iii) sex; (iv) pregnancy; (v) marital status; (vi) ethnic or social origin; (vii) colour; (viii) sexual orientation; (ix) age; (x) disability; (xi) religion; (xii) conscience; (xiii) belief; (xiv) culture; (xv) language; and (xvi) birth. Section 9(2) of the Constitution, however, permits fair discrimination, through legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination (as defined above). Therefore steps which may appear to be contrary to the principle of equality may legitimately be taken in order to ensure substantive equality for persons or groups who have been disadvantaged by unfair discrimination. Therefore, a person wishing to be appointed as a director of a company, and who is not so appointed, may rely on the provisions of section 9(1) of the Constitution if such person is unfairly discriminated against. The affirmative action considerations referred to in section 9(2) of the Constitution may, however, be applicable in cases of discrimination.