The Corporate Governance Review

Third Edition

Editor
Willem J L Calkoen

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I am proud to present to you the new edition of *The Corporate Governance Review*.

In this third edition, we can see that corporate governance is becoming a more prominent topic with each year. We see that everyone wants to be involved in ‘better corporate governance’: parliaments, governments, the European Commission, the SEC, the OECD, the UN (as demonstrated in its ‘protect, respect and remedy’ framework), the media, supervising national banks, shareholder activists and other stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can become quite quickly outdated. Most directors are working diligently; nevertheless, there have been failures in some sectors and this means that trust has to be regained. How can directors carry out their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should outside directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperious CEOs? Can lead or senior directors create sufficient balance? Should outside directors understand the business? How much time should they spend on the function? How independent must they be? Should their pay be lower? What about diversity?

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative Acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practices set aspirational standards.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, wise boards have ‘selected engagements’ with stewardship shareholders in order to create trust. What more can they do to show stakeholders that they are improving the enterprises other than by setting a better ‘tone from the top’. Should they put big signs on the buildings emphasising: integrity, stewardship and respect?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code and many countries
produced national codes along the model of the Cadbury ‘comply-or-explain’ method. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs have gradually amassed too much power, or companies have not developed new strategies and have fallen into bad results – and sometimes even failure. More are failing in the financial crisis than in other times, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists.

This all implies that executive and non-executive directors should work harder and increasingly as a team on strategy and innovation. It is still a fact that more money is lost due to lax directorship than to mistakes. On the other hand, corporate risk management is an essential part of directors’ responsibilities, and sets the tone from the top.

Each country has its own measures; however, the various chapters of this book show a convergence. The concept underlying this book is to achieve a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that will permit convenient comparisons, where a quick ‘first look’ at key issues is helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that The Corporate Governance Review will be seen, in time, as an essential reference work in our field.

To meet the all-important content quality objective, it was a condition sine qua non to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project, and I hope that this book will give the reader food for thought; you always learn about your own law by reading about the laws of others.

Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
April 2013
I OVERVIEW OF GOVERNANCE REGIME

The Companies Act 71 of 2008, (‘the Companies Act’ or ‘the Act’), which came into force on 1 May 2011, applies to all South African companies. The Companies Act brought about a wholesale overhaul of South African company law and it seeks to introduce best practice and promote transparency and accountability in the South African corporate sector.

Corporate governance was institutionalised in South Africa through the King Reports on Corporate Governance (‘the King Codes’). The King Codes were published by the King Committee, which was formed under the auspices of the Institute of Directors of Southern Africa in 1992. Many of the recommendations contained in the King Codes have been included in the Companies Act.

The first King Report (‘King I’) was issued in 1994. King I aimed to formalise what had become generally accepted corporate governance norms and procedures. King I did not apply to all companies, and its application was restricted to entities such as companies with securities listed on the Johannesburg Stock Exchange (‘the JSE’), government departments, state-owned companies, banks and insurance companies.

The second King Report (‘King II’) was issued in 2002. King II replaced and expanded on King I and identified seven fundamental characteristics of good corporate governance: discipline, transparency, independence, accountability, responsibility, fairness and social responsibility. King II applied to government departments, state-owned companies, all companies with securities listed on the JSE, banks and insurance companies.

King II has now been replaced by the third King Report (‘King III’), which was introduced as a result of the proposed introduction of the Companies Act, as well as

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changes in international corporate governance trends. King III came into effect on 1 March 2010.

King III focuses on issues such as leadership, sustainability and corporate citizenship, and it applies to all South African entities, regardless of the manner and form of their incorporation and whether they are in the public or private sector.

King III reflects a shift from a ‘comply-or-explain’ approach to an ‘apply-or-explain’ approach to corporate governance, in terms of which all entities are required to disclose how they apply the principles prescribed in King III. If any principles are not applied, King III requires an explanation of why such principles have not been applied. This disclosure is aimed at enabling ‘stakeholders’ to make informed decisions on the levels of governance that are applied within each entity. ‘Stakeholders’ include shareholders, institutional investors, creditors, lenders, suppliers, customers, regulators, employees, unions, media, analysts, consumers, society in general, communities, auditors and potential investors.

Guidelines and Practice Notes are released by the Institute of Directors (‘the Institute’) from time to time in order to supplement the principles that are enunciated in King III. In addition to these Guidelines and Practice Notes, the Institute issued a document entitled ‘Code of Responsible Investing in South Africa’ (‘CRISA’), which came into effect on 1 February 2012. CRISA encourages institutional investors to promote sound governance in companies in which they invest.

II CORPORATE LEADERSHIP

Section 66 of the Companies Act provides that the business and affairs of a company must be managed by or under the direction of its board of directors, which has the authority to exercise all of the powers and perform all of the functions of the company, except to the extent that the Companies Act or the company’s memorandum of incorporation (‘MoI’) provide otherwise.

Section 66 of the Companies Act further stipulates that:

a the board of a private company must comprise of at least one director;

b the board of a public company must comprise of at least three directors in addition to the minimum number of directors that the company must have to satisfy any requirement to appoint an audit committee, or a social and ethics committee; and

c the company’s MoI may specify a higher minimum number of directors.

In terms of the Companies Act, a company’s MoI may specifically authorise one or more named persons to appoint and remove one or more directors. It may also provide for one or more persons to be ex officio directors of the company, and it may provide for the appointment or election of one or more persons as alternate directors of the company. When the power to appoint and remove directors is vested in the board, it is a fiduciary power which must be exercised in the best interest of the company. Importantly, in the case of a profit company (other than a state-owned company), the MoI must provide for the election by shareholders of at least 50 per cent of the directors and 50 per cent of any alternate directors.

Except to the extent that the MoI of a company provides otherwise, the company may pay remuneration to its directors for their services, but such remuneration may only
be paid in accordance with a special resolution approved by the shareholders within the
previous two years.

Section 69 stipulates that a person is ineligible to be a director of a company if
that person is a juristic person, an unemancipated minor, under legal disability or if such
person does not satisfy any requirement set out in the company’s MoI. In addition, a
person is disqualified from being a director if a court has so declared, if the person is an
unrehabilitated insolvent, if he or she is prohibited in terms of any public regulation to be
a director of a company, if he or she has been removed from an office of trust on grounds
of misconduct involving dishonesty, or if he or she has been convicted (in South Africa
or elsewhere) of various categories of offences involving theft, fraud, forgery, perjury,
dishonesty or offences in connection with the promotion, formation or management of a
company. Where persons have been removed from office on the grounds of misconduct,
or have been convicted of the offences referred to above, the disqualification applies for
a period of five years after the removal from office or the completion of the sentence
imposed for the relevant defence, but these periods may be extended.

Section 71 of the Companies Act provides that, notwithstanding anything in
the company’s MoI, or any agreement between the company and a director or between
any shareholders and a director, a director may be removed by an ordinary resolution
adopted at a shareholders’ meeting by the persons who are entitled to exercise voting
rights in the election of that director. Before the shareholders may consider any such
resolution, however, the director must be given notice of the meeting and he or she must
be afforded an opportunity (either personally or through a representative) to make a
presentation before the resolution is put to a vote.

Section 72 of the Companies Act entitles companies to appoint board committees
and delegate to any committee any authority of the board. Such committees may include
persons who are not directors of the company, but no such person may be ineligible or
disqualified to be a director and no such person has a vote on any matter to be decided by
the committee. Board committees may consult with or receive advice from any person,
and they have the full authority of the board in respect of any matters referred to them.
The creation of any committee and the delegation of any power, however, does not by
itself satisfy or constitute compliance by a director with his or her duties as a director.

Section 73 of the Companies Act provides that a director who is authorised by the
board may call a meeting at any time, and such person must call a meeting, if required
to do so by at least 25 per cent of the directors, in the case of a board that has at least 12
members, or two directors, in any other case. The company’s MoI may specify higher or
lower percentages than those referred to above.

Except to the extent that the MoI provides otherwise, a majority of directors must
be present at a meeting before a vote may be called, each director has one vote, a majority
of the votes cast on a resolution is sufficient to approve the resolution and, in the case of
a tied vote, the chair may cast a deciding vote if the chair did not initially have or cast
a vote, failing which the matter fails. Unless the MoI provides otherwise, directors and
shareholders may participate in meetings by electronic communication, provided that
the electronic facility employed ordinarily enables all the persons participating in that
meeting to communicate concurrently with each other without an intermediary and to
participate effectively in the meeting.
The Companies Act requires directors to disclose all personal financial interests and provides that no director may use their position of director, or any information obtained while acting in such capacity, to gain advantage for himself or herself or for any person other than the company or a wholly owned subsidiary, or to knowingly cause harm to the company or a subsidiary.

Section 76(3) of the Companies Act obliges directors to exercise their powers and perform their functions:

- in good faith and for a proper purpose;
- in the best interests of the company; and
- with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions and having the general knowledge, skill and experience of that director.

Section 77 of the Companies Act recognises that a director may be held liable, in accordance with the principles of the common law relating to breach of a fiduciary duty, for loss, damages or costs sustained by the company as a consequence of a breach of fiduciary duty. In addition, the section specifically provides that a director of a company is liable for loss, damages or costs sustained as a direct or indirect consequence of the director having:

- acted in the name of the company, or purported to do so, despite knowing that he or she lacked the authority to do so;
- acquiescing in the conduct of the company’s business despite knowing that it was being conducted recklessly or under insolvent circumstances;
- been a party to an act or omission of the company that had a fraudulent purpose;
- signed, consented to or authorised any financial statements that are false or misleading in a material respect, or a prospectus that is materially incorrect; or
- been present at a meeting and failed to vote against acts that are contrary to the Companies Act, including issuing unauthorised shares, granting financial assistance and approving distributions, other than as permitted by the Companies Act and the company’s MoI.

Section 77(6) of the Companies Act clearly provides that the liability of a person in terms of Section 77 is joint and several with any other person who is or may be held liable for the same act. Proceedings to recover any such loss from a director may not be commenced more than three years after the act or omission that gave rise to the liability.

Section 78 recognises that directors may be covered by directors’ insurance, but any agreement and any provision in the MoI, or any resolution of a company that seeks to relieve a director of any liability that would otherwise attach to him or her for a breach of a statutory obligation, may be held to be void.

Section 94 obliges each public company, each state-owned company and any other company that is required by its MoI to have an audit committee to elect an audit committee comprising of at least three members unless:

- the company is a subsidiary of another company that has an audit committee; and
- the audit committee of that other company will perform the audit committee functions on behalf of the subsidiary in question.
Each member of the audit committee must:

a. be a director of the company;

b. not be involved in the day-to-day management of the company’s business or have been so involved at any time during the previous financial year;

c. not be a prescribed officer or full-time employee of the company or another related group company, or have been such an officer or employee at any time during the previous three financial years;

d. not be a material supplier or customer of the company, such that a reasonable and informed third party would conclude that the integrity, impartiality or objectivity of the director is compromised by that relationship; and

e. not be closely related to any person who falls within any such criteria.

A person is not deemed to have knowledge of the procedural requirements stipulated in the company’s MoI merely because the MoI has been filed. Section 15(3) of the Companies Act, however, entitles the board to make, amend and repeal rules relating to the governance of the company by publishing a copy of those rules in any manner permitted by the MoI and filing a copy of those rules. Members of the public are then deemed to have notice of any such requirements that have been published. No such rule may conflict with the MoI. An act of a company that is not in express contravention of the Act is not void merely because the company did not have the capacity to perform the act because of restrictions in its MoI, or because the directors did not have the authority to perform that act on behalf of the company.

Section 20(1)(a) provides that a contract concluded by a company will not be void simply because the directors had no authority to authorise the action as a result of the capacity of the company. Accordingly, if there is a lack of authority on any other basis, the company may not be bound by the contract.

If a company’s MoI limits the authority of the directors to perform certain acts, the shareholders may ratify such acts provided such act is not a contravention of the Companies Act. Any such ratification by the shareholders must take place by way of a special resolution. The special resolution amends the MoI.

A person (other than a director, prescribed officer or shareholder of the company in question) who deals with the company in good faith is entitled to presume that the company has complied with all of the formal and procedural requirements stipulated in terms of the Act, its MoI and any rules of the company. This is a rebuttable presumption and it is regulated by Section 20(7) of the Companies Act.

King III recommends that a board of directors should ideally be comprised of a majority of independent non-executive directors and King III makes it clear that these independent non-executive directors should be entitled to access to all relevant information. For purposes of complying with their fiduciary duties and ensuring that they are in possession of all information required to make informed decisions, they may conduct site visits and they may talk to members of management.

The Companies Act does not specifically differentiate between executive directors and non-executive directors for purposes of determining whether they have complied with their respective duties; however, when applying the tests to determine whether they have complied with their duties, the nature of their appointment and the nature
and extent of their involvement in the affairs of the company are obviously taken into consideration.

King III stipulates that ‘The Board should appoint the chief executive officer and establish a framework for the delegation of authority’ and that ‘Directors should be appointed through a formal process’. King III contemplates that this process will be facilitated by a nomination committee and that the board should make full disclosure regarding individual directors to enable shareholders to make their own assessments of directors.

According to King III, ‘the Board should elect a chairman of the Board who is an independent non-executive director. The CEO of the company should not also fulfil the role of the chair’.

King III further states that: ‘the Board should comprise a balance of power, with a majority of non-executive directors. The majority of non-executive directors should be independent.’

King III prescribes that the following factors should be taken into account in determining the number of directors to be appointed:

a. the needs of the company, its business, any evolving circumstances;
b. the necessity of maintaining approximate needs of executive and non-executive directors’ regulatory requirements;
c. the necessary skills and knowledge required to make sound judgement and action on behalf of the company; and
d. the need to have adequate and sufficient directors to structure the Board Committees.

III DISCLOSURE

Every South African company must maintain at least one office in South Africa and its address at the time of incorporation must be noted in its notice of incorporation. Any change to the registered or principal office must also be notified. In addition, each company must maintain a copy of its MoI and any amendments thereto, any rules of the company, a record of its directors as well as copies of all annual financial statements, reports presented at annual general meetings (‘AGMs’), written communications sent generally to all holders of any class of securities, as well as minutes of all meetings and resolutions of all directors, directors’ committees and the audit committee. Each profit company must also maintain a register of its securities.

A person who holds (or who has a beneficial interest in) any of the company’s securities has the right to inspect and copy information contained in the relevant records of the company, with the exception of board minutes and accounting records. The Companies Act also allows non-shareholders to access certain records of the company.

The annual financial statements of a public company must be audited, and the financial statements of private companies must be audited if they achieve a ‘public interest’ score that takes into account asset value, turnover, number of employees and similar factors. All companies, however, must prepare annual financial statements within six months of the end of each financial year. A person who holds (or has a beneficial interest in) any securities issued by a company is entitled to receive notice of the publication of
any annual financial statements. The notice must set out the steps required to obtain a copy of the statements. It is interesting to note that trade unions and the like may indirectly secure access to a company’s financial statements for purposes of initiating business rescue processes.

In addition to these general requirements, public companies and state-owned companies are obliged to comply with additional disclosure requirements. These are stipulated in Chapter III of the Companies Act. A private company is not required to comply with Chapter III unless its MoI provides otherwise. Broadly speaking, Chapter III obliges the relevant companies to appoint an auditor, establish an audit committee and appoint a company secretary.

The company secretary of a public company or a state-owned company must be a permanent resident of the Republic of South Africa, and his or her duties include:

a. providing the directors with guidance about their duties, responsibilities and powers;

b. ensuring that the directors are aware of relevant laws;

c. reporting to the board on any failure by the company to comply with the Act;

d. ensuring that all relevant minutes of meetings are maintained;

e. certifying that the company has submitted all relevant returns and whether such returns appear to be true, correct and up to date;

f. ensuring that the company’s financial statements are sent to all persons who are entitled to them; and

g. ensuring that the company’s annual return is filed.

In terms of Section 90 of the Companies Act, all public companies, state-owned companies and private companies (to the extent required in terms of their MoI) must appoint an auditor. The auditor must not be (or for the previous five years have been) a director, officer or employee of the company, or a consultant to the company who was or has been engaged for more than one year in the maintenance of any of the company’s financial records or preparation of the financial statements, or have served as company secretary of that company, or be related to any such person. The same individual may not serve as auditor or ‘designated auditor’ for more than five consecutive years and, if such individual serves in such capacity for more than two consecutive financial years and then ceases to serve in such capacity, he or she may not be appointed to the same position again until the expiry of at least a further two financial years. If an auditor who is not nominated by the audit committee is appointed at an AGM, such appointment is only valid if the audit committee is satisfied that the proposed auditor is independent of the company.

The auditor has the right to access the accounting records and books of the company at all times. He or she is also entitled to require from the directors and officers of the company any information and explanations required for the performance of his or her duties. The auditor of a holding company has access to the financial statements of any subsidiary and the auditor is entitled to attend the AGM of the company, receive notices relating to general meetings and be heard at general meetings on matters that concern his or her duties.

Each public company, state-owned company and private company (but only to the extent that a private company’s MoI obliges the company to do so) must elect an
audit committee on an annual basis. The audit committee must comprise at least three directors who are not involved in the day-to-day management of the company’s business. The audit committee has very broad duties that include nominating the auditor, stating whether the audit committee is satisfied that the auditor is independent, dealing with any complaints relating to the accounting practices and internal audits of the company and making submissions to the board on the company’s accounting policies, financial control and the like.

Every state-owned company, public company and certain categories of large private companies are required to appoint a social and ethics committee. A company’s social and ethics committee must comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company’s business, and must not have been so involved within the previous three financial years.

The social and ethics committee is, inter alia, responsible for monitoring the company’s activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters such as good corporate citizenship, environmental, health and public safety, advertising, public relations, and compliance with both consumer protection laws and labour laws. The committee must draw matters within its mandate to the attention of the board and report to the shareholders on matters within its mandate.

King III provides that all companies should prepare an annual integrated report that sets out in detail the social, economic and environmental impact the company has had on the community in which it operates. The report should be based on substance rather than form and should disclose complete, timely, relevant, accurate, honest, accessible and comparable information, and also state the future projections of the company.

The integrated report should include the following information:

- the financial statements and any commentaries made by the board with regard to the company’s financial results;
- disclosure on how the company has made its money;
- disclosure on whether the company is a going concern and whether or not it will continue to be a going concern in the financial year ahead;
- a report on how the operations of the company have impacted the economic, social and environmental wellbeing of the community in which it operates; and
- a report on financial and sustainability issues.

King III recommends that the board should delegate the duty of overseeing and reporting on sustainability to the audit committee, and the audit committee should review the integrated report to ensure and confirm that the information contained therein is reliable and does not contradict the financial aspects of the report.

The JSE Listing Requirements require all ‘issuers’ to disclose the following in their annual reports:

- a statement setting out how the issuer has applied the principles set out in King III, together with an explanation that enables shareholders to evaluate how the principles have been applied; and
- a statement that provides in detail the extent to which the issuer has not applied the King Code and its reasons for any non-compliance.
In terms of the most recent King III practice notes, it is recommended that the statement contemplated in (a) should be in a form of a register, setting out how each of the 75 King III principles have been applied. The register should be a ‘living document’ and should be updated on an ongoing basis. It is also recommended that the statement contemplated in (b) should include sufficient information to enable readers of the statement to comment on (and challenge) the quality of a company’s governance.

With effect from their financial years beginning after 1 April 2010, the Listing Requirements oblige public listed companies to comply with the following corporate governance requirements:

\(a\) an issuer must have a policy that provides details to the board on the formal and transparent procedures followed in all appointments, a second policy that clearly sets out the balance of power and authority at board level and a third policy providing details on non-audit services provided by external auditors;

\(b\) the nomination committee must have a minimum of two non-executive directors and the majority of the members must be independent directors. The nomination committee should be chaired by the chair of the board;

\(c\) all issuers must appoint an audit committee, a remuneration committee and, where required, a risk and nomination committee. The issuer’s annual report must disclose the composition of such committees and must give a brief description on their mandates, meetings held by the committees in the relevant year and other relevant information;

\(d\) each issuer must appoint a chief executive officer and an independent non-executive chair, however these positions may not be held by the same person. If the chair is not an independent director, the issuer must appoint a lead independent director as required in King III;

\(e\) the notice of the AGM contained in the issuer’s annual report must be accompanied by a brief curriculum vitae of each director who stands for election or re-election at the AGM; and

\(f\) each director must be categorised as an executive director, a non-executive director or an independent director.

IV CORPORATE RESPONSIBILITY

The South African government has passed complex laws aimed at promoting the interests of historically disadvantaged South Africans. These laws (which are commonly known as ‘black economic empowerment’ (‘BEE’) laws) seek to redress historical social and economic imbalances. Although these laws do not prescribe minimum levels of local shareholding, management control or the like, they do result in a situation in which it is very difficult for companies that operate in South Africa to secure contracts or licences from the South African government or state-owned entities (or from companies that rely on such contracts or licences) unless they have a minimum of local black-owned shareholding or management control (typically, 26 per cent is required). Foreign investors that seek to open South African operations should bear in mind the BEE legislation referred to above, particularly if their South African operations will seek to provide services to the South African government (or state-owned companies), or if
they will operate in industries where operating licences are required (such as the mining industry).

The Protected Disclosures Act 26 of 2000 affords protection to ‘whistle-blowers’. Similarly, Section 159 of the New Companies Act protects any shareholder, director, company secretary, prescribed officer, employee or trade union representative who discloses information pertaining to any contravention of that Act.

V SHAREHOLDERS

The board of a company or any other person specified in its MoI may call a meeting of the shareholders at any time. A company must hold a shareholders’ meeting where the board is required by the Companies Act or the MoI to refer a matter to the shareholders for decision, whenever required to fill a vacancy on the board, when an AGM of a public company is required or when otherwise required by the company’s MoI.

A shareholders’ meeting must also be convened if one or more written and signed demands for such a meeting are delivered to the company, which describes the purpose of the requested meeting, and these demands are made and signed by the holders of at least 10 per cent of the shares entitled to be voted in respect of the matter in question. The company or any shareholder may apply to court to set aside any such request for a shareholders’ meeting on the basis that the requests are frivolous, vexatious or on the basis that the matter in question has already been decided.

The quorum for all shareholder meetings is the presence of the holders of at least 25 per cent of the shares entitled to be voted at the meeting. The MoI may, however, set lower percentages.

Regardless of the quorum, if a company has more than two shareholders, a meeting may not begin unless at least three shareholders are present at the meeting. Shareholder resolutions are taken either by way of ordinary resolution or special resolution. A special resolution must be supported by the holders of at least 75 per cent of the voting rights exercised on the resolution and an ordinary resolution is supported by a simple majority of the voting rights.

The MoI may provide for lower percentages in respect of special resolutions and for different and lower percentages for resolutions in respect of specified matters. It may also provide for a higher percentage in respect of ordinary resolutions; however, the percentage difference required for purposes of an ordinary resolution and a special resolution must be at least 10 per cent.

Voting may take place by way of a show of hands, in which case each shareholder has one vote. However, in a poll, each shareholder is entitled to exercise all voting rights attaching to all shares held by him or her (including shares held by proxy). There is no requirement that all issued shares must have equal voting rights.

A company may not dispose of all or the greater part of its assets or undertaking without the approval of its shareholders by way of a special resolution. The same applies in relation to amalgamations or mergers.

Any shareholder, director, prescribed officer or even a trade union representing the employees of the company may take proceedings to restrain the company from acting in contravention of the Companies Act. Each shareholder has a claim for damages
against any person who fraudulently, or due to gross negligence, causes the company to act contrary to the Companies Act or a limitation imposed by virtue of the MoI.

Any shareholder or director of a company may apply to court for relief from oppressive or unfairly prejudicial conduct. The courts are afforded a very broad discretion to make any order they think fit, including appointing a liquidator or directing an issue or exchange of shares. Statutory derivative actions are available to shareholders, directors, prescribed officers and registered trade unions that represent employees of a company.

If a company, other than pursuant to a business rescue plan, notifies its shareholders that a resolution will be proposed to amend its MoI by altering rights, limitations, preferences or any terms of any class of shares in any manner that is materially adverse to the rights and interests of the holders of a class of shares, or to dispose of all or substantially all of its assets, or to enter into a merger or amalgamation or a scheme of arrangement, any dissenting securities holder who receives such notice may send a written objection to the company. Within 10 business days after the company has adopted the resolution, it must confirm this fact to each security holder who filed an objection and has not withdrawn such objection or voted in favour of the resolution. Any such shareholder may then demand that the company pay the securities holder the fair value for his or her shares. The company is then obliged to make a written offer to acquire the shares in question at the fair value. If the company fails to make such an offer, or if the shareholder disputes the fair value offered, the shareholder may apply to court to determine a fair value and for an order requiring the company to pay the shareholder that fair value. All dissenting shareholders who have not accepted an offer from the company as at the date of that application must be joined as parties.

The Companies Act makes provision for dispute resolution procedures aimed at addressing complaints, disputes or contraventions of the Act or the MoI. These include mediation, arbitration and court actions. Aggrieved parties may also file a complaint with the Companies and Intellectual Property Commission or the Take Over Regulation Panel.

The Companies Act further makes provision for a Companies Tribunal, which is responsible for adjudicating over certain applications brought to it in terms of the Companies Act. The order made by the Companies Tribunal may be filed in the High Court as an order of court.

The Companies Act makes provision for mandatory offers to minority shareholders and the forced removal of minority shareholders in certain circumstances.

VI OUTLOOK

The Companies Act, combined with the detailed principles and recommendations in King III, provides a comprehensive basis for ensuring fair, transparent and accountable corporate governance in South Africa. Corporate social responsibility will become increasingly regulated in years to come. Although the Companies Act came into effect on 1 May 2011, the enforceability of certain provisions of the Act was suspended in relation to pre-existing companies. Pre-existing companies were granted a two-year transitional period within which to ensure full compliance with the Act. The transitional period expires on 30 April 2013, by which date all South African companies must be fully compliant with the Companies Act.
Appendix 1

ABOUT THE AUTHORS

DAVID WALKER
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David Walker has been a director in Werksmans Attorneys’ commercial department since 1999. He specialises in private equity mergers and acquisitions, management buyouts and takeovers, privatisations, public–private partnerships and corporate governance. His experience extends to complex technology supply and outsourcing arrangements and construction projects as well as contractual, statutory and regulatory issues in the technology, power, mining and construction sectors. He is a regular speaker at local and international conferences on issues such as corporate governance, mergers and acquisitions and regulatory requirements. Mr Walker has been named as a leading lawyer in the corporate, energy and outsourcing fields and he has BCom and LLB degrees from the University of the Witwatersrand in Johannesburg.

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